Supreme Court, U.S.
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No. 08- 08-608

IN THE

Supreme Court of the United States

ROBERT FLIPPING and ARTHUR SNELLBAKER,

Petitioners,

v.

ROBERT REILLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in holding that a public employee's in-court testimony, made pursuant to his official duties, is cloaked with First Amendment protection notwithstanding this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)?

2. Whether the Third Circuit ignored established principles of qualified immunity in holding that government employers are subject to suit under 42 U.S.C. §1983 when they discipline employees for speech that is made pursuant to their official duties, and in so doing, improperly affirmed the District Court of New Jersey's denial of qualified immunity?

3. Assuming the Respondent's testimony was protected, whether the Third Circuit so far departed from the accepted and usual course of judicial proceedings involving claims of qualified immunity when it failed to abide by this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which stands for the proposition that upon an employee's demonstration that his conduct is constitutionally protected and was a motivating factor in the employer's adverse employment decision, a reviewing court must go on to determine whether the employer would have reached the same decision even in the absence of the protected conduct?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F.3d 216 (3d Cir. 2008), and is reprinted at Appendix A. The opinion of the District Court of New Jersey is reported at 427 F. Supp.2d 507 (D.N.J. 2006), and is reprinted at Appendix B. The order accompanying the District Court of New Jersey's opinion granting in part and denying in part Petitioners' Motion for Summary Judgment is reprinted at Appendix C. The Orders denying the Petitions for Rehearing and for Rehearing *En Banc* are unreported and are reprinted at Appendices D and E.

JURISDICTION

The Third Circuit issued its opinion on July 1, 2008. (Appendix A), and the Petitions for Rehearing and for Rehearing E*n Banc* were denied on August 6, 2008. (Appendices D and E). The within joint Petition, filed on behalf of Petitioners Arthur Snellbaker and Robert Flipping, is timely filed within ninety (90) days of the entry of the Orders denying the Petitions for Rehearing and Rehearing *En Banc* pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. This Court has jurisdiction to review the Third Circuit's decision pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The constitutional/statutory provisions relevant to the within Petition are as follows:

1. The First Amendment, which provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, ..." U.S. Const., amend. I.

2. Title 42, Section 1983 of the United States Code, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case involves an employment action filed on behalf of a retired Atlantic City police officer, Robert Reilly (referred to as "Respondent" or "Reilly") alleging, *inter alia*, retaliation in violation of his First Amendment right to freedom of speech against Arthur Snellbaker, former Chief of Police of Atlantic City, and Robert

Flipping, former Public Safety Director of Atlantic City (jointly referred to as "Petitioners"). Respondent, a detective in the Police Department's Investigations Unit, claims that Petitioners retaliated against him by forcing him to retire because of testimony he gave during the trial of a fellow officer, Dennis Munoz, who was indicted as a result of an investigation of the Police Department's Vice Squad. It is undisputed that this testimony occurred approximately ten (10) years prior to Petitioners' recommendation that he be subjected to increased discipline for sexually harassing a subordinate female officer. (App. 4a – 5a).

Petitioners deny that any action taken by them was motivated by Respondent's trial testimony involving Dennis Munoz. Rather, the events that transpired stem from serious allegations of sexual harassment filed against Reilly by Kelly Buzby, a subordinate female officer. As a result of these allegations, a formal investigation ensued and, eventually, there was a formal disciplinary proceeding utilizing an outside hearing officer, Willis F. Flower, Esquire. Ultimately, Hearing Officer Flower issued a written report of his findings, concluding that Reilly "engaged in conduct which derided and belittled ["Buzby"] and made offensive, derogatory and sexually explicit comments toward women while in the presence of [Buzby] and other subordinate officers." Notwithstanding these conclusions, the only disciplinary action recommended by Hearing Officer Flower was that Reilly be suspended without pay for four days. (App. 5a – 6a).

After considering the disciplinary action recommended by Hearing Officer Flower, Snellbaker,

in his capacity as Chief of Police, recommended to Flipping, in his capacity as Public Safety Director, a reduction in rank as the appropriate discipline that should be imposed in light of Reilly's "egregious and reprehensible conduct." (App. 6a – 7a). Thereafter, Flipping recommended to the City Business Administrator not only that Reilly be demoted and given a ninety (90) day suspension, but also that he be removed from the promotion list. (App. 7a). Significantly, it is undisputed that none of these written recommendations made any reference to Reilly's testimony during the Munoz trial; rather, they were in direct response to the guilty finding reached by the independent hearing officer.

In June 2003, Robert Reilly retired from the Atlantic City Police Department as a Sergeant. Reilly retired pursuant to a "Consent Agreement" between Reilly and his employer, the City of Atlantic City. (App. 3a). The Consent Agreement allowed him to retire with his full pension and a lump sum payment instead of facing recommendations of increased discipline and a Final Notice of Disciplinary Action by the Appointing Authority stemming from the Hearing Officer's finding of guilt for Reilly's creating a sexually hostile work environment. (App. 9a).

On or about December 16, 2003, Reilly filed a Complaint in the District Court for the District of New Jersey against Snellbaker, Flipping, the City of Atlantic City, and Joseph McCullough.[1] The Complaint contained the following claims: (1) allegations brought pursuant

[1] The claims against Joseph McCullough, another police officer, were voluntarily dismissed.

to 42 U.S.C. § 1983 claiming violations of (a) Reilly's rights under the First Amendment in retaliation for speaking on matters of public interest and concern and (b) his procedural and substantive due process rights in connection with his employment as an Atlantic City police officer; (2) conspiracy to violate Reilly's civil rights in violation of 42 U.S.C. § 1985(3); (3) violation of Reilly's rights under New Jersey's Conscientious Employee Protection Act; (4) common law civil conspiracy; and (5) arbitrary and illegal discipline. (App. 9a – 10a).

On April 5, 2006, the District Court dismissed on summary judgment Plaintiff's conspiracy claim under 42 U.S.C. § 1985(3) contained in Count II of the Complaint and the procedural due process claim against Petitioners, finding that they were entitled to qualified immunity to the extent said claim was based on the theory that the disciplinary decision was based upon evidence not considered by Hearing Officer Flower. However, the District Court denied summary judgment with respect to Respondent's First Amendment retaliation claim and Fourteenth Amendment procedural due process claim, to the extent the due process claim was based upon the theory that someone other than the authorized decision maker made the final determination of discipline; found that neither of the individual defendants was entitled to qualified immunity with respect to either of the aforesaid constitutional claims; and also denied summary judgment on the common law civil conspiracy[2] and CEPA claims. (App. 46a – 84a; 85a – 87a).

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[2] The common law civil conspiracy claim had been previously dismissed by the District Court and was thereafter resurrected *sua sponte* by the District Court. This claim was subsequently dismissed on Snellbaker's Motion for Reconsideration.

On appeal, the Third Circuit reversed the District Court's denial of summary judgment based upon qualified immunity with respect to Respondent's procedural due process claim, concluding that Respondent failed "to provide any authority for the proposition that a civil servant may state a valid due process claim where s/he has resigned before taking advantage of any post-deprivation procedures available." (App. 41a). However, the Third Circuit affirmed the District Court's denial of summary judgment on the First Amendment claim notwithstanding its recognition that "the speech at issue on this appeal, Reilly's testimony, appears to have stemmed from his official duties in the investigation." (App. 29a). Believing there to be "no precedential appellate decision[s] after *Garcetti* answering the question whether truthful trial testimony arising out of the employee's official responsibilities constitutes protected speech," the Third Circuit concluded that "Reilly's truthful testimony in court constitutes citizen speech and that his claim is not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." (App. 28a – 31a). The Third Circuit also held that Petitioners were not entitled to qualified immunity with respect to the First Amendment retaliation claim because "[t]he protected status of courtroom testimony was clearly established" and that "*Garcetti* does not alter that conclusion." (App. 32a).

The Third Circuit also rejected Petitioners' argument in the alternative that Respondent's First Amendment retaliation claim should have been dismissed pursuant to *Mount Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and

its progeny, since it was undisputed that the Petitioners would have made the same decision regardless of Reilly's testimony in Munoz.

Petitions for Rehearing with a Suggestion for Rehearing *En Banc*, which included requests that the Third Circuit certify the question raised to this Court pursuant to Supreme Court Rule 19, were timely filed and denied. (Appendices D and E). This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE ANY DOUBT REGARDING THE APPLICATION OF ITS PRIOR DECISION IN *GARCETTI v. CEBALLOS*, 547 U.S. 410 (2006).

In no uncertain terms, this Court drew a line in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), when it held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. In *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), the Third Circuit crossed that line when it ignored its own finding under the "official duties" test – that Reilly's speech was made pursuant to his official duties (App. 29a) – and created and completed a second phase "forum" analysis, concluding that "Reilly's truthful testimony in court constituted citizen speech and that his claim is not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." (App. 31a). It is respectfully submitted that this holding contradicts the majority's decision in

Garcetti, is in conflict with other Circuit Courts of Appeal which have been called upon to address this issue (whether a public employee spoke pursuant to his official duties and, if so, whether such speech was afforded First Amendment protection) post-*Garcetti*, and is in tension with other opinions of the Third Circuit that applied only the *Garcetti* "official duties" test.

A. The Third Circuit's Opinion Conflicts With *Garcetti*.

Writing for the majority in *Garcetti*, Justice Kennedy succinctly stated: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. The fact that this was a bright-line rule is emphasized by the following passages contained in all three dissenting opinions: "The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties' is 'Sometimes,' not 'Never.'" *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting); "Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at 430 (Souter, J., dissenting); "The majority answers the question by holding that 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does

not insulate their communications from employer discipline.' In a word, the majority says, 'never.'" *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting).

Notwithstanding this Court's unequivocal statement that "the controlling factor" is that the public employee's expressions are made pursuant to his/her official duties, *id.* at 421, the Third Circuit in *Reilly* instead focused on the forum through which Respondent's speech was made; to wit, testimony in court. (App. 29a-31a). Thus, in addition to the *Garcetti* "official duties" test the Third Circuit created and applied a second phase "forum" test. Taken to its logical extreme, the Third Circuit's decision stands for the proposition that so long as a public employee conveys his/her speech in court, regardless of whether the speech was made pursuant to the employee's official duties, it is worthy of First Amendment protection. As such, *Reilly* is in conflict with this Court's majority decision in *Garcetti* which, as recognized by Justice Souter, "require[s] categorical exclusion of First Amendment protection against any official retaliation for things said on the job." *Id.* at 434 (Souter, J., dissenting).

Acknowledging that *Garcetti* "narrowed the Court's jurisprudence in the area of employee speech," the Third Circuit framed the issue as follows: "whether Reilly spoke as a citizen when he testified at the Munoz trial." (App. 23a). In reaching its decision, the Third Circuit relied upon cases such as *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996) and *Green v. Philadelphia Housing Authority*, 105 F.3d 882 (3d Cir. 1997), which stand for the proposition that trial testimony, whether given

pursuant to subpoena or voluntarily, is, generally speaking, protected by the First Amendment. (App. 25a-27a). Those cases, however, were decided before *Garcetti*, which clearly and unambiguously stands for the proposition that a public employee's speech is not protected where he/she "make[s] statements pursuant to [his/her] official duties." *Garcetti*, 547 U.S. at 421. Significantly, the Third Circuit concluded that "Reilly, as an Atlantic City police officer, assisted a state investigation of a fellow officer and testified for the prosecution at the subsequent trial. **Thus, the speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation.**" (App. 29a) (emphasis added).[3] In light of *Garcetti*, once the Third Circuit decided that the speech was pursuant to Reilly's official duties, the analysis should have ended. *See Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (noting that *Garcetti* has "clarified and simplified" the inquiry regarding whether a public employee's speech is protected under the First Amendment).

Having determined that Reilly's speech stemmed from official duties when he testified in connection with the Munoz trial, the Third Circuit was obligated to conclude that his First Amendment retaliation was foreclosed pursuant to the 'official duties" doctrine

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[3] In *State v. Rasch*, 197 N.J. Super. 184, 484 A.2d 361 (App. Div. 1984), it was recognized that in addition to their enforcement duties, police officers "are required to testify in cases is which they are involved." *Id.* at 190. Thus, there can be no doubt that the Third Circuit correctly concluded that Reilly's trial testimony in the Munoz case stemmed from his official job duties as a police officer.

enunciated in *Garcetti*, notwithstanding the line of cases cited by the Third Circuit which recognized "the fundamental role in-court testimony plays in our society and its importance to the question of whether a public employee's speech is protected by the First Amendment." (App. 27a). As this Court recognized in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), and reaffirmed in *Agostini v. Felton*, 521 U.S. 203, 237 (1997), "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." 490 U.S. at 484; 521 U.S. at 237. While the Third Circuit may have been free to disagree with the majority's holding in *Garcetti*, it was not free to disregard it. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975).[4]

In his dissenting opinion, Justice Souter questioned the constitutional line drawn by the majority, and cautioned that statements other than the disposition memorandum authored by Ceballos, such as his courtroom testimony, should be "analyzed independently to protect the integrity of the judicial process." *Garcetti*, 547 U.S. at 430; 444 (Souter, J., dissenting). The Third Circuit seized upon this language and took it upon itself to carve out an exception to the *Garcetti* majority's clear and

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[4] Indeed, the Third Circuit has recognized, albeit in a different context, that it is not free to disregard binding Supreme Court precedent. *See U.S. v. Johnson*, 206 Fed. Appx. 158, 162 (3d Cir. 2006).

unambiguous holding. If nothing else, this case gives this Court the perfect opportunity to address Justice Souter's concerns.

B. The Third Circuit's Decision Conflicts With Decisions From Other Circuits.

Apparently of the opinion that the constitutional line drawn by the majority was blurry, the Third Circuit, after focusing on a line of cases (all of which pre-date *Garcetti*) that stand for the general proposition that truthful testimony in court is protected by the First Amendment, took the position that there were "no precedential appellate decision[s] after *Garcetti* answering the question whether truthful trial testimony arising out of the employee's official responsibilities constitutes protected speech." (App. 28a). Notwithstanding the Third Circuit's belief to the contrary, however, there is conflicting precedent in other Circuit Courts of Appeal which stands for the proposition that speech made pursuant to a public employee's official duties, even in the context of testimony, is not entitled to First Amendment protection.

In *Green v. Barrett*, 226 Fed. Appx. 883 (11th Cir.), *rehearing and rehearing en banc denied*, 254 Fed. Appx. 800 (11th Cir.), *cert. denied*, 128 S. Ct. 439, 169 L. Ed. 2d 307 (2007), plaintiff, a former chief jailer, brought a civil rights action pursuant to 42 U.S.C. § 1983 against her employer claiming that she was retaliated against in violation of her First Amendment rights when she was fired for testifying about what she believed were unsafe conditions at the county jail. Relying upon this Court's decision in *Garcetti*, the Eleventh Circuit found that

plaintiff's testimony was not protected by the Constitution because it was given pursuant to her official duties. *Id.* at 886. Accordingly, the Eleventh Circuit reversed the District Court for the Northern District of Georgia's denial of summary judgment on qualified immunity grounds because, under the circumstances, plaintiff's firing did not violate her First Amendment rights notwithstanding the fact that the speech at issue involved courtroom testimony. In so holding, the Eleventh Circuit expressly stated that its decision was "not affected by the fact that the plaintiff made the statements in testimony." *Green*, 226 Fed. Appx. at 886.

Significantly, this Court declined the invitation to review *Green*. Presumably, the petition for a writ of certiorari was denied because the Eleventh Circuit properly applied this Court's holding in *Garcetti*. The fact that the Third Circuit has done just the opposite in *Reilly* is yet another reason why this petition should be granted. Simply put, this case gives the Court the perfect opportunity to resolve the split in the Circuits and settle once and for all whether Garcetti established an absolute rule or whether a second phase "forum" analysis, as created and applied by the Third Circuit for speech made in court, is required.

The Seventh Circuit was similarly called upon to determine whether testimony before a legislative body was deserving of First Amendment protection in *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008). There, plaintiff, a state employee, gave public testimony before the Illinois House Gaming Committee about the Governor and Illinois Department of Revenue's "alleged interference with the Illinois Gaming Board's

operations, their misuse of public funds and their alleged attempts to influence the outcome of licensing investigations and sales of casinos." *Id.* at 1079. Plaintiff claimed that as a result of her testimony, she was retaliated against in violation of her First Amendment rights. As in *Green, supra*, the Seventh Circuit recognized the "official duties" analysis called for by *Garcetti* and phrased the issue as follows: "if Ms. Tamayo's testimony before the House Gaming Committee was given as part of her official duties, then her speech was not protected by the First Amendment." *Id.* at 1091. Notwithstanding her bare conclusory allegations to the contrary, the Seventh Circuit found that plaintiff's testimony had in fact been given pursuant to her the duties of her job and, therefore, concluded that her speech was not protected under the First Amendment. *Id.* at 1092.

The Third Circuit in *Reilly* stated that *Tamayo* is distinguishable. (App. 28a, n.5). Apparently, the Third Circuit believed that the obligation to give truthful testimony is of greater significance where the testimony takes place in court as opposed to before a legislative body. It is respectfully submitted that this is a distinction without a difference. The obligation to provide truthful testimony should be the same regardless of the forum in which the testimony is given. The inference drawn from the Third Circuit's footnote to the effect that legislative testimony is not worthy of the same need for protection as in- court testimony is yet another reason why this Court should grant the within Petition. It is respectfully submitted that Congress would disagree with the distinction proffered by the Third Circuit.

The decisions of the Seventh Circuit in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 905 (2008) and 128 S.Ct. 931 (2008), and *Fairley v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), both of which were cited by the Third Circuit in *Reilly* (App. 29a) lend further support to the Petitioners' argument that a conflict now exists regarding the application of *Garcetti*. As the Third Circuit recognized in *Reilly*, in both *Morales* and *Fairley* the Seventh Circuit concluded that the speech at issue – testimony – was afforded First Amendment protection because in both cases the testimony was not given pursuant to the plaintiff's official duties. (App. 29a). Had it been determined that the testimony at issue in either of those cases had been given pursuant to the public employee's official duties, the Seventh Circuit presumably would have ruled just the opposite given the analysis contained in both of those opinions.

As Judge Flaum expressed in *Morales*, wherein it was determined that the police officer's conversation with the assistant district attorney regarding the criminal allegations against the police chief and deputy chief was not protected because it was made pursuant to his official duties but that his deposition testimony in a civil suit regarding the same subject matter was protected:

> We recognize the oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. Indeed, this is exactly the concern that

> Justice Stevens voiced in his dissent in *Garcetti*: "[I]t is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description." . . . Despite Justice Stevens' admonishment, *Garcetti* established just such a framework, and we are obliged to apply it.

Id. at 597-98. The quotation above highlights what the Third Circuit was obligated to do in *Reilly* – namely to apply the framework established by *Garcetti*. By engaging in the second phase "forum" analysis, the Third Circuit in *Reilly* ignored the *Garcetti* "framework" and in so doing created a clear conflict among the Circuits which have decided the issue of whether testimony pursuant to a public employee's job duties is protected speech under the First Amendment. This Court desperately needs to resolve this issue to ensure that both public employers and employees alike have a clear understanding of this area of constitutional jurisprudence.

C. The Third Circuit's Decision Conflicts With Other Post-*Garcetti* Opinions of the Third Circuit and from other Federal Courts of Appeal.

Since *Garcetti*, the Third Circuit has had the opportunity to apply the "official duties" doctrine on at least two (2) separate occasions. *See Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006); *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007). In those cases, because the speech at issue arose out of the public

employee plaintiff's official duties, the Third Circuit properly concluded in both cases that *Garcetti* barred the First Amendment retaliation claim.

In *Hill*, the Third Circuit held that because a report to borough council regarding the mayor's conduct and harassing actions was prepared by a former borough manager pursuant to his official duties, it was not protected speech for First Amendment purposes as a matter of law under *Garcetti*. *Hill*, 455 F.3d at 241-42. A different panel of the Third Circuit reached the same conclusion a year later in *Foraker*, where it was held that complaints made by state troopers both up the chain of command and to a state auditor regarding problems at a firing range were not protected by First Amendment pursuant to *Garcetti* because the reports were made pursuant to plaintiffs' duties as government employees. *Id.* at 238-43.

The decision in *Reilly* is in tension with the Third Circuit's prior decisions in *Hill* and *Foraker*. The panel below found that the Reilly's speech was entitled to First Amendment protection notwithstanding its conclusion that the trial testimony at issue "stemmed from his official duties." (App. 29a). In so doing, the panel in *Reilly* failed to heed what the panel in *Foraker* recognized a year earlier: "The result required by *Garcetti* illustrates how that opinion narrowed the Court's jurisprudence in the area of employee speech." *Foraker*, 501 F.3d at 241. That such tension exists within the Third Circuit itself is yet another reason this Court should grant the within Petition.

The decision below is also in tension with the plethora of cases from other Circuits which have adhered to the "official duties" doctrine enunciated in *Garcetti* in a variety of factual situations which, admittedly, do not involve testimony, but do involve matters of public concern. *See, e.g., Williams v. Dallas Independent School District*, 480 F.3d 689, 694 (5th Cir. 2007) (holding that *Garcetti* foreclosed retaliation claim of high school athletic director who was discharged after writing memorandum to school principal concerning handling of school athletic funds because memo was necessary in order for plaintiff to perform functions of his job); *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (rejecting K-9 unit officer's contention that his complaints regarding cuts to the K-9 program were protected following *Garcetti* in light of the fact that he was acting as a public employee carrying out his professional responsibilities at time memo to police chief was written); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1091-92 (7th Cir. 2008) (holding that testimony before House Gaming Committee was not protected by the First Amendment pursuant to *Garcetti* where testimony was given by plaintiff in connection with her official duties); *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 648 (7th Cir. 2006) (affirming dismissal of First Amendment retaliation claim brought by city police sergeant pursuant to *Garcetti* due to finding that plaintiff spoke in her official capacity as public employee when she told her supervisors that police chief's plan to reduce number of crime prevention officers under her command would not work); *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (holding that because reports prepared by female corrections officer documenting sexual harassment by prisoners and inaction on the part

of her supervisors were submitted pursuant to her official duties, *Garcetti* barred plaintiff's First Amendment claim to the extent it was based upon said reports), *cert. denied*, 127 S.Ct. 1918 (2007); *Boyce v. Andrew*, 510 F.3d 1333, 1343-47 (11th Cir. 2007) (reversing denial of summary judgment on qualified immunity with respect to First Amendment retaliation claim pursuant to *Garcetti* because complaints of plaintiffs, case workers employed by county to investigate cases of alleged child abuse/neglect, through e-mails and other internal channels regarding size of their caseloads as allegedly putting certain unidentified children at risk were made pursuant to official duties and not as citizens); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1241-43 (11th Cir. 2007) (affirming dismissal of First Amendment retaliation claim on summary judgment pursuant to *Garcetti* because disclosures of plaintiff, city clerk who also acted as city treasurer, to persons associated with city government about mayor's use of city funds for personal expenses and mayor's sexual harassment of clerk's assistant were made pursuant to her official responsibilities); *Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir 2007) (affirming judgment entered as a matter of law at trial after close of plaintiff's case pursuant to *Garcetti* based upon finding that statements of plaintiff, community college professor, raising concerns about legality of college's actions were made pursuant to official job duties and, therefore, plaintiff's First Amendment retaliation was foreclosed).

As these cases demonstrate, as soon as it is determined that the speech at issue was made pursuant to the employee's official duties, the analysis ends. Post-*Reilly*, however, a further inquiry into the forum

through which the speech was conveyed is now necessary, and if it is determined that the speech at issue involves truthful testimony in court the speech is arguably entitled to First Amendment protection. Hypothetically, then, each and every one of the cases cited above would have come out differently if the speech at issue involved courtroom testimony. Such a result, however, ignores the majority's recognition in *Garcetti* that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe **any** liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22 (emphasis added).

II. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH WELL-ESTABLISHED PRINCIPLES GOVERNING THE QUALIFIED IMMUNITY ANALYSIS THAT MUST BE UNDERTAKEN WHEN GOVERNMENTAL OFFICIALS APPROPRIATELY SEEK DISMISSAL OF CLAIMS PRIOR TO TRIAL.

The defense of qualified immunity requires that the official be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "Thus a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999).

As set forth in Section I, *supra*, it is the position of the Petitioners that they did not violate Reilly's First Amendment rights pursuant to this Court's decision in *Garcetti*. Where "constitutional rights were not violated, 'there is no necessity for further inquiries concerning qualified immunity.'" *Los Angeles County v. Rettele*, 127 S. Ct. 1989, 1994, 167 L. Ed. 2d 974 (2007) (citing, *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Should this Court determine that the Third Circuit was correct in finding that the "official duties" doctrine enunciated in *Garcetti* did not foreclose Reilly's First Amendment claim, (App. 31a), it is submitted that certiorari should still be granted because the Third Circuit misapplied the "clearly established" test and reached the wrong conclusion.

The Third Circuit in *Reilly* stated that "[t]he protected status of courtroom testimony was clearly established even at the time we decided *Pro*."[5] (App. 32a). However, simply relying upon general precedent that stands for the proposition that truthful testimony in court is protected by the First Amendment as the Third Circuit did is not the test. *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004). As this Court made clear in *Saucier*, the denial of qualified immunity cannot rest on previously articulated general principles; rather, it requires a greater degree of specificity that puts the governmental actor on notice that what he/she is doing violates the right at issue. *Saucier*, 533 U.S. at 201-02. More problematic is the fact that after applying general precedent to what should have been a particularized inquiry, the Third Circuit in *Reilly* concluded that the

[5] *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996).

law was clearly established notwithstanding that the Third Circuit acknowledged in *Pro* there were at least two other Circuit Courts of Appeal, namely the Fourth and Seventh Circuits, that did not agree with the Third Circuit's opinion that all testimony in court deriving from a subpoena is protected. *Pro*, 81 F.3d at 1291.

Whether *Garcetti* left open an exception to the "official duties" doctrine for in-court testimony, as concluded by the Third Circuit, apparently remains to be seen. This is exactly why Petitioners have asked this Court to review *Reilly*. In *Wilson v. Layne*, 526 U.S. 603 (1999), this Court noted that "if judges . . . disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Id.* at 618. The Petitioners have shown that the Circuit Courts of Appeal disagreed at the time the Third Circuit decided *Pro*. The Petitioners have also shown that the Circuit Courts of Appeal disagree post-*Garcetti*. It is therefore unfair to have expected the Petitioners to have understood what was clearly established when the Circuit Courts of Appeal have not agreed, and for this additional reason the Petition should be granted. In light of the plain error committed by the Third Circuit in concluding that this area of First Amendment jurisprudence was clearly established, Petitioners respectfully request that this Court consider exercising its right of summary reversal.

III. THE DECISION BELOW IS IN CONFLICT WITH THE WELL-ESTABLISHED PRECEDENT WHICH STANDS FOR THE PROPOSITION THAT UPON AN EMPLOYEE'S DEMONSTRATION THAT HIS CONDUCT IS CONSTITUTIONALLY PROTECTED AND WAS A MOTIVATING FACTOR IN THE EMPLOYER'S ADVERSE EMPLOYMENT DECISION, A REVIEWING COURT MUST GO ON TO DETERMINE WHETHER THE EMPLOYER WOULD HAVE REACHED THE SAME DECISION EVEN IN THE ABSENCE OF THE PROTECTED CONDUCT.

In *Reilly*, the Third Circuit found that "[t]he facts identified by the District Court were sufficient to establish a *prima facie* case" and then summarily concluded that it could not "further 'consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove.'" (App. 34a – 35a) (quoting, *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 147 (3d Cir. 2002)). At no point, however, did the Third Circuit address whether Reilly could maintain his First Amendment claim in light of the fact that Petitioners had presented evidence that they would have made the same recommendations to the Appointing Authority regardless of the allegedly protected speech made ten years prior. In so doing, the Third Circuit ignored the well-settled principles established by this Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and its progeny.

As this Court explained over thirty years ago in *Mt. Healthy*:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 285-86. Accordingly, "the employer still prevails by showing that it would have reached the same decision in the absence of protected conduct" even where a public employee "shows that protected speech was a 'motivating factor' in an adverse employment decision." *Crawford-El v. Britton*, 523 U.S. 574, 593 (1998). In other words, "where [as here] a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

It is undisputed that Petitioners submitted evidence that their recommendations for increased discipline stemmed from Reilly's sexual harassment of Kelly Buzby, as confirmed by the independent hearing officer. (App. 6a-9a). In this regard, the Third Circuit explicitly noted that it was Petitioners' position that their disciplinary recommendation "was justified by Reilly's violations and in no way connected to Reilly's speech in the Munoz matter . . . ." (App. 33a). While it may be true that the Third Circuit did not have jurisdiction to review the District Court's determination that Reilly had presented sufficient evidence regarding Petitioners' motivation (App. 35a), this does not mean, *ipso facto*, that Petitioners were not entitled to qualified immunity. To the contrary, "[t]he *Mt. Healthy* doctrine is part of the law and, when the concept is presented by a defendant's argument, must not be overlooked in the qualified immunity analysis." *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996).

It is submitted that *Reilly* should be reviewed for the reasons expressed by Judge Fisher in his dissent in *Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006), the very case cited by the panel in *Reilly* in support of its position that the argument that Petitioners' disciplinary recommendations were justified by Reilly's violations and was in no way connected to his speech in the Munoz matter was "more properly viewed as a challenge to the factual issues of motivation and rebuttal." (App. 33a). As Judge Fisher explained, relying upon this Court's prior decisions in *Mt. Healthy*, *Crawford-El*, and *Texas*, "[p]roof that the same actions would have been taken regardless of the official's intent cleaves the strand of causation between the constitutional violation and the harm, precluding success on the claim." *Montiero*, 436 F.2d at 408 (Fisher, J., dissenting). Thus, the argument goes, "the presence of improper motive does not preclude qualified immunity." *Id.* at 409. Rather, and as this Court made clear in *Mt. Healthy*, once an employee in a First Amendment retaliation case presents a *prima facie* case, it is incumbent upon a reviewing court to then determine whether the employer "ha[s] shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Id.* at 287; *see also Nicholas v. Pennsylvania State University*, 227 F.3d 133, 144 (3d Cir. 2000) (noting that *Mt. Healthy* makes it "crystal clear that an employee may not recover in a dual-motives case if the employer shows that it would have taken the same action even absent the protected speech"); *Larsen v. Senate Com. of Pa.*, 154 F.3d 82, 95 (3d Cir. 1998) (recognizing that bare allegations of retaliatory motive do not necessarily defeat an assertion of qualified immunity in

a retaliation claim since, in some circumstances, the legitimate basis for the actions might be so apparent that an employee's allegations of retaliatory motive could not alter the conclusion that under the circumstances alleged, the employer would have been compelled to reach the same decision even without regard for the protected First Amendment activity), *cert. denied*, *Nix v. Larsen*, 525 U.S. 1144 (1999).

The Third Circuit's failure to address whether Petitioners would have made the same decision under the circumstances constitutes a clear departure from the accepted and usual course of judicial proceedings where qualified immunity is asserted as a defense. "Qualified immunity is too important a right of public servants and too important a public policy to be nullified so easily." *Foy*, 94 F.3d at 1533. It is submitted, therefore, that the within Petition should be granted for this alternative reason as well.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter. The Court may also wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JULY 1, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-2591

ROBERT REILLY

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING; JOSEPH B. MCCULLOUGH; ARTHUR SNELLBAKER

Robert Flipping,
Appellant

No. 06-2734

ROBERT REILLY

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING; JOSEPH B. MCCULLOUGH; ARTHUR SNELLBAKER

Arthur Snellbaker,
Appellant

Appendix A

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 03-cv-05975)
District Judge: Hon. Joseph E. Irenas

Argued April 15, 2008

Before: SLOVITER, JORDAN and ALARCÓN*,
Circuit Judges

(Filed: July 1, 2008)

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

The issue before us is whether we have jurisdiction from the order of the District Court denying Defendants'/Appellants' claim of qualified immunity.

I.

Appellee Robert Reilly, a former Atlantic City police officer, filed suit against Robert Flipping, the Director of Public Safety, and Arthur Snellbaker, the Chief of Police, claiming that they retaliated against him for his participation, including trial testimony, in an investigation conducted jointly by state and local police a decade earlier. The claimed retaliation consisted of the

* Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

formal recommendation by Flipping and Snellbaker that Reilly be demoted from his position as sergeant and be suspended for ninety days notwithstanding the recommendation of an independent hearing officer, following an extensive investigation, that Reilly serve a four-day suspension for violating police department regulations. Reilly, who accepted Flipping's offer that he retire as a sergeant instead of being disciplined, then filed this suit claiming that Appellants' actions violated his First Amendment free speech rights and his Fourteenth Amendment right to procedural due process.

The District Court partially denied Appellants' motions for summary judgment. In the procedural posture of this appeal, we cannot decide the merits of Reilly's retaliation claim or of the various defenses thereto put forward by Appellants because we are limited to issues of law underlying the qualified immunity claims. Nonetheless, in deciding the jurisdiction issue, we must necessarily consider Appellants' contention that the District Court erred in holding Reilly's trial testimony was protected by the First Amendment and erred in holding Reilly's allegedly forced retirement gives rise to a claim for the violation of his Fourteenth Amendment right to procedural due process, because these are issues of law underlying Appellants' qualified immunity claims.

Appendix A

II.

Reilly was an Atlantic City police officer from 1978 until his resignation on June 1, 2003. Flipping, an Atlantic City police officer, was the Director of Public Safety for Atlantic City at the time of Reilly's resignation. Snellbaker, also an Atlantic City police officer, was the Chief of the Atlantic City Police Department at the time that Reilly resigned.

In the late 1980s and early 1990s, while Reilly was a member of the vice and intelligence units, he had a role in several investigations that targeted Flipping or individuals close to him.[1] The highly publicized investigation of corruption in the Atlantic City Police Department focused on Dennis Munoz, Flipping's friend and colleague. The Munoz investigation was conducted by the state police with the assistance of personnel in the Atlantic City Police Department. One of Reilly's informants, a prostitute named Lori Ann Jones who alleged that Munoz acted as her pimp, provided the basis of the state's case against Munoz. Reilly was called to testify as a witness for the prosecution in the resulting trial. Flipping, who was one of Munoz's supervisors in the vice section, was also a suspect in the investigation but was never charged. Flipping assisted Munoz's

1. Reilly was involved in an investigation of allegations of drug dealing and the theft of utility services at a funeral home owned by Flipping's father, and allegedly investigated Flipping for failing to report to work and altering his time cards. There is no evidence that Flipping was aware of these particular investigations or Reilly's role in any such investigations.

defense by providing Munoz's lawyer with information about witnesses against Munoz; he also testified for Munoz at the trial. Flipping was aware that Reilly was involved in the Munoz case and may have heard Reilly's testimony at the trial.

Reilly alleges Snellbaker's animus toward him stems from Snellbaker's dislike of James DiNoto, a former Chief of the Atlantic City Police Department, who was Reilly's mentor in the department. There is some evidence that DiNoto was also involved in the Munoz investigation. Flipping and Snellbaker had contentious relationships with DiNoto. In 1998, they were plaintiffs in a lawsuit alleging retaliation and due process claims against DiNoto, in part based on Flipping's testimony at the Munoz trial. *See McCullough v. City of Atlantic City,* 137 F.Supp.2d 557, 561, 563 (D.N.J.2001). Reilly asserts that after DiNoto was named Chief of Police, Snellbaker, who had authority over Reilly, began demeaning him in front of other officers. In their depositions, other Atlantic City police officers testified that both Snellbaker and Flipping harbored animosity toward Reilly and refused to promote him. One officer asserted that Flipping was angry with Reilly about his role in the Munoz matter and that Flipping's promotion to Director of Public Safety gave him "his first true opportunity to get even" with Reilly. Flipping App. at 281.

In November 2000, Reilly was charged with engaging in inappropriate conduct toward a subordinate, Officer Kelly Buzby, creating a hostile work

environment, making untruthful statements to Internal Affairs, and improperly contacting witnesses. The matter was referred to an independent hearing officer, Willis Flower, a local attorney. Flower held a hearing at which at least twelve persons testified. In a twenty-eight page opinion dated February 14, 2003, Flower made numerous findings of fact and conclusions of law. He dismissed the charges that Reilly had made untruthful statements and improperly contacted witnesses, but found that Reilly had "engaged in conduct which derided and belittled [Buzby] and made offensive, derogatory and sexually explicit comments toward women while in the presence of [Buzby] and other subordinate officers" in violation of the police department's rules and regulations. Flipping App. at 215. Nonetheless, Flower found that "the objective facts of th[e] case, taken in a vacuum, do not present a fair picture of what actually occurred. In short, the surrounding circumstances go a long way to explain and mitigate the literal violations." Flipping App. at 241. Thus, he concluded that "dismissal, reduction in rank or lengthy suspension is not called for here." Flipping App. at 241. Instead, he recommended "a four day suspension without pay" as discipline. Flipping App. at 241.

There is evidence that Snellbaker was displeased that Flower had made a disciplinary recommendation, apparently because he believed that exceeded Flower's role. In a letter to Flipping dated February 24, 2003, Snellbaker emphasized the violations of which Reilly had been found guilty. Significantly, he did not discuss the charges that Flower had dismissed, Flower's

disciplinary recommendation, or Flower's explanation of the mitigating circumstances and context of Reilly's behavior. He also did not view Reilly's disciplinary history before making his recommendation. Snellbaker concluded that he could "not overlook the egregious and reprehensible conduct of a superior towards the most impressionable of his subordinates," Flipping App. at 243, and thus he recommended a reduction in rank.

Flipping asserts that he waited for Snellbaker's recommendation before reading the recommendation in the Flower report. After receiving Snellbaker's recommendation, Flipping had the assistant personnel director obtain a copy of what purported to be Reilly's disciplinary history from the City personnel office on February 26, 2003. The City's personnel director testified that the document Flipping relied upon did not look like something prepared by her office. The document Flipping obtained contained substantial inaccuracies, such as the inclusion of a thirty-day suspension which had been rescinded and which nearly tripled the number of days Reilly had actually been suspended. Flipping asserts that he did not know the document was inaccurate at the time he prepared his recommendation.

On March 7, 2003, Flipping sent two letters to the City's Business Administrator. One recommended that Reilly be removed from the promotion list; the other recommended that he be suspended for ninety days and demoted from sergeant to patrolman. In his letters, Flipping referred to the violations which Flower found

Reilly had committed but Flipping omitted mention of the charges against Reilly that Flower had dismissed. One letter stated that Reilly had "exhibited behavior throughout his career that indicates racism, bigotry, sexism, lack of impartiality toward the public, irresponsibility, bringing the department into disrepute, failures to perform lawful duties from competent authority as directed and failures to treat others with respect." Flipping App. at 248. Many of these characterizations appear to have been exaggerated. The only evidence of racism in Reilly's record (which consists of Reilly's unarguably inaccurate disciplinary history) was an allegation from 1979 that Reilly had made remarks of a racial nature.

Although Reilly had not been disciplined or charged with any violations from 1985 until the Buzby incident in 2000, Flipping's letter asserted that this "seeming 'hiatus' during the middle of his career should not mislead anyone into believing that this is a history of unrelated or isolated incidents or that Reilly's behavior has changed or improved. . . . For reasons unknown (perhaps related to previous administrations' lapse or malaise) no appropriate action was taken against Reilly's insidious behavior."[2] Flipping App. at 248. Flipping did not mention that Reilly's most recent performance evaluation (August 2002) contained his supervisor's

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2. Of course, one of the "previous administrations" referred to in Flipping's letter was DiNoto's, with whom Flipping and Snellbaker shared an openly antagonistic relationship. *See generally McCullough*, 137 F.Supp.2d 557.

highest possible evaluation for his performance and the supervisor's statements that Reilly was first on the list for promotion to captain and that "[t]he only way Sgt. Reilly's job performance could be improved is promotion." Flipping App. at 296.

Some time after sending his letters to the City's Business Administrator, Flipping informed Reilly's attorney of his disciplinary recommendation. The attorney told Reilly that Flipping would allow him to retire as a sergeant if he retired immediately. After a period of negotiation, on May 30, 2003, Reilly signed a consent agreement providing for his retirement. In his deposition, Reilly explained, "I felt compelled to sign [the agreement] because I just gave up. I threw my arms up, I said I had enough. After being beat down for all those years . . . I gave up." Flipping App. at 115. As part of that agreement, Reilly received his pension and a lump sum payment due him.

Shortly thereafter, Reilly filed a lawsuit against the City of Atlantic City, Flipping, Snellbaker, and another police officer, Joseph McCullough.[3] The complaint, filed in part pursuant to 42 U.S.C. § 1983, alleged violation of Reilly's First Amendment right to speak about matters of public concern, his Fourteenth Amendment rights to substantive and procedural due process, conspiracy under 42 U.S.C. § 1985, violation of

3. McCullough was a co-plaintiff with Flipping and Snellbaker in their 1998 lawsuit against DiNoto. *See generally McCullough*, 137 F.Supp.2d 557.

New Jersey's Conscientious Employee Protection Act ("CEPA"), civil conspiracy, and arbitrary and illegal discipline. The District Court dismissed Reilly's substantive due process claim and his civil conspiracy claim in June 2004, and Reilly settled with McCullough in October 2005.

On April 5, 2006, the District Court granted Appellants' motions for summary judgment on the § 1985 claim. *Reilly v. City of Atlantic City*, 427 F.Supp.2d 507, 526 (D.N.J.2006). The District Court also held that Flipping and Snellbaker were entitled to qualified immunity on the procedural due process claim "to the extent the claim [was] based on the theory that the disciplinary decision was based upon evidence not considered by . . . Flower." *Id.* However, the District Court declined to grant Flipping and Snellbaker qualified immunity on the procedural due process claim to the extent it was "based upon the theory that someone other than the authorized decision maker made the final determination of discipline in Plaintiff's case," and denied the motions for summary judgment in all other respects. *Id.* The District Court denied Snellbaker's motion for reconsideration on May 3, 2006. Snellbaker and Flipping filed timely notices of appeal.

III.

The District Court had jurisdiction over Reilly's federal civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and over the pendent state law claims pursuant to 28 U.S.C. § 1367. Our jurisdiction is

contested, and will be addressed presently. To the extent that we have jurisdiction, we exercise plenary review over a denial of summary judgment based on a lack of qualified immunity. *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 208 (3d Cir.2001). We necessarily exercise de novo review over an argument alleging a lack of appellate jurisdiction.

IV.

Shortly after these appeals were filed, Reilly filed motions to dismiss them for lack of appellate jurisdiction. A motion panel of this court denied those motions. In his appeal briefs, Reilly renews his argument that the appeals should be dismissed for want of jurisdiction.

As an initial matter, we consider briefly Snellbaker's contention that Reilly's jurisdictional argument is barred by the law of the case doctrine because the motion panel denied Reilly's earlier motions to dismiss asserting the same jurisdictional argument. Snellbaker relies on our decisions applying the law of the case doctrine to merits issues decided in the course of disposing of prior appeals. *See Africa v. City of Philadelphia (In re City of Philadelphia Litig.)*, 158 F.3d 711, 717-18 (3d Cir.1998); *Bolden v. Se. Pa. Transp. Auth.*, 21 F.3d 29, 31-32 (3d Cir.1994). Here, there was no determination of the merits of the motions, merely orders by the motion panel denying Reilly's motions to dismiss which, under our internal operating procedures, must be referred "without decision and without prejudice, to the merits panel." Third Circuit I.O.P.

10.3.5; *cf. Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 130 (3d Cir.1998) (relying on I.O.P. 10.3.5 for analogous proposition that a motion panel granting leave to appeal does not bar a merits panel from examining the court's jurisdiction and subsequently declining to permit the appeal). Although the motion panel did not explicitly refer Reilly's motions to dismiss to the merits panel, its denials of those motions effectively constituted such referrals and do not preclude Reilly from renewing his jurisdictional argument at this time. Therefore, we turn to the merits of that argument.

The determination whether a public official is entitled to qualified immunity involves a two-step analysis. First, the court must "decide 'whether a constitutional right would have been violated on the facts alleged. . . .' " *Doe v. Groody*, 361 F.3d 232, 237 (3d Cir.2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). "If the answer to that question is 'yes,' we must then 'consider whether the right was "clearly established." ' " *McKee v. Hart*, 436 F.3d 165, 169 (3d Cir.2006) (quoting *Groody*, 361 F.3d at 238). If the answer to that second question is also "yes," then the defendant is not entitled to qualified immunity. *Id.*

Ordinarily, denial of summary judgment would not be a final appealable order, but the Supreme Court has held that "a district court's denial of a claim of qualified immunity, *to the extent that it turns on an issue of law*, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final

judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis added); *see also Blaylock v. City of Philadelphia*, 504 F.3d 405, 408-09 (3d Cir.2007).

Because the collateral order doctrine which was the basis for the *Forsyth* opinion provides only limited appellate jurisdiction, courts of appeals must determine whether an appeal pursuant to that doctrine presents an issue of law or challenges a district court's conclusion that "there is sufficient record evidence to support a set of facts under which there would be no immunity." *Schieber v. City of Philadelphia*, 320 F.3d 409, 415 (3d Cir.2003) (citing *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)). We do not have jurisdiction to review the latter determination. In other words, "for each of [plaintiff's] claims, our jurisdiction to review the District Court's order denying summary judgment depends on whether the defendants' appeal raises pure questions of law or whether it challenges the District Court's determination of which facts were sufficiently supported by evidence." *Blaylock*, 504 F.3d at 409. With respect to facts, "we may review whether the set of facts identified by the district court is sufficient to establish a violation of a clearly established constitutional right, but we may not consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove." *Forbes v. Twp. of Lower Merion*, 313 F.3d 144, 147 (3d Cir.2002) (citation and internal quotation marks omitted).

V.

Reilly alleges that Flipping and Snellbaker retaliated against him for exercising his First Amendment rights in the context of the Munoz investigation and trial. As the District Court succinctly stated, Reilly claims Appellants "severely increased the discipline he was to receive for the sexual harassment incident, which effectively forced his retirement, in retaliation for his participation in the Munoz investigation and trial." *Reilly*, 427 F.Supp.2d at 514. Appellants deny that Reilly had the claimed First Amendment right, an issue of law appropriate for us to consider.

The District Court evaluated Reilly's First Amendment retaliation claim under the following three-step framework: (1) the employee must demonstrate that his/her speech is protected, that is, it addresses a matter of public concern and the "employee's interest in the speech outweighs" the employer's countervailing interest "in promoting workplace efficiency and avoiding workplace disruption" (i.e., the balancing test established in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); (2) the employee must prove that his/her speech was "a substantial or motivating factor" in the retaliatory action against him/her, which, if proven; (3) shifts the burden to the employer to prove that the "allegedly retaliatory action would have been taken absent the protected [speech]." *Id.* at 514-15 (quoting *Springer v. Henry*, 435 F.3d 268, 275 (3d Cir.2006)).

In undertaking the requisite analysis, the District Court relied on *Baldassare v. New Jersey*, 250 F.3d 188, 195-97 (3d Cir.2001), in which we held that plaintiff's conduct and expression in an internal investigation of other officers at the Bergen County Prosecutors' Office was a matter of public concern, and *Pro v. Donatucci*, 81 F.3d 1283, 1291 n. 4 (3d Cir.1996), in which we held that "the context of [courtroom testimony] raises the speech to a level of public concern regardless of its content. . . ." The District Court concluded that "Reilly's participation in the internal investigation of alleged criminal wrongdoing within the Atlantic City Police Department is protected by the First Amendment" because he conducted "an official internal investigation" into other officers' alleged criminal wrongdoing and then "testified at the Munoz trial." *Reilly*, 427 F.Supp.2d at 515. The Court held that the *Pickering* balancing favored Reilly because the public's interest in uncovering police corruption outweighed the police department's interest in avoiding disruption in the workplace. *Id.* at 515-16.

Next, the District Court pointed to record evidence suggesting that Flipping sought to prevent Reilly's promotion because of his role in the Munoz case and drew an inference from the facts in the record, including Snellbaker's knowledge of the Munoz case and his dissatisfaction with Flower's recommendation, that Snellbaker conspired with Flipping to retaliate against Reilly for the same reason. *Id.* at 516. Therefore, the Court concluded that Reilly had established a prima facie case of retaliation. The Court further stated that

there were material issues of disputed fact about "(a) whether Reilly's increased punishment was substantially motivated by his participation in the Munoz case and (b) whether his increased punishment would have occurred in the absence of his participation." *Id.* (citing *Baldassare*, 250 F.3d at 195 (stating that determinations under the first step of the retaliation analysis present questions of law for the court, whereas the latter two determinations present questions for the fact finder)).

Having concluded that there was sufficient evidence of a violation of a constitutional right, the Court analyzed whether that right was clearly established. The Court held that Reilly's right to be free from retaliation for speech protected by the First Amendment was clearly established because the situation in *Baldassare* was factually similar to that presented in Reilly's case and *Baldassare* had been decided prior to the retaliatory actions alleged here; thus the Court reasoned that "a reasonable official in Flipping's or Snellbaker's position in 2003 would have understood that increasing Reilly's punishment in retaliation for his participation in the Munoz investigation and trial violated Reilly's First Amendment rights." *Id.*

Approximately two months after the District Court entered the order on appeal here, the Supreme Court issued its decision in *Garcetti v. Ceballos*, 547 U.S. 410, 413, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), considering "whether the First Amendment protects a government employee from discipline based on speech made pursuant

to the employee's official duties." Ceballos, a calendar deputy for a branch of the Los Angeles District Attorney's Office, filed suit against the District Attorney and two supervisors, claiming he suffered retaliation for writing a memorandum to his supervisors raising concerns about the accuracy of an affidavit used to support a search warrant. He had also attended a meeting with his supervisors and the warrant affiant regarding the affidavit, and testified at a hearing after being called by the defense. *Id.* at 413-15, 126 S.Ct. 1951. Asserting that he was subjected to a series of retaliatory employment actions, Ceballos filed a claim under 42 U.S.C. § 1983, alleging that his employer "violated the First and Fourteenth Amendments by retaliating against him based on his memo. . . ." *Id.* at 415, 126 S.Ct. 1951.

In its opinion, the Supreme Court distinguished between employee speech and citizen speech. The Court recognized that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* at 417, 126 S.Ct. 1951. On the other hand, the Court stated that it was necessary to limit government employees' freedom because employers "need a significant degree of control over their employees' words and actions," *id.* at 418, 126 S.Ct. 1951, and government employees, "[w]hen they speak out, . . . can express views that contravene governmental policies or impair the proper performance of governmental functions," *id.* at 419, 126 S.Ct. 1951. Emphasizing the distinction, the Court explained that "[s]o long as employees are

speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). The Court also recognized that "the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id.* Therefore, the Court explained that its decisions "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Id.* at 420, 126 S.Ct. 1951 (citing *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

Applying these principles to the case before it, the Court stated that the "controlling factor" was that Ceballos prepared the memo "pursuant to his duties as a calendar deputy." *Id.* at 421, 126 S.Ct. 1951. The Court emphasized the importance of this fact, because by writing the memo "Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case. . . ." *Id.* The Court held that under these circumstances, restricting the speech contained in Ceballos' memo "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has

commissioned or created." *Id.* at 421-22, 126 S.Ct. 1951 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). It also noted that in appropriate circumstances, the supervisor could take "corrective action." *Id.* at 423, 126 S.Ct. 1951. The Court compared the preparation of the memo to Ceballos' other "daily professional activities, such as supervising attorneys, investigating charges, and preparing filings," each of which Ceballos performed as a government employee. *Id.* at 422, 126 S.Ct. 1951. It distinguished such tasks from "contributions to the civic discourse," which "retain the prospect of constitutional protection" for the speaker. *Id.* The Court concluded, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail." *Id.* at 424, 126 S.Ct. 1951.

Flipping and Snellbaker argue that under *Garcetti* they are entitled to qualified immunity on Reilly's First Amendment claim as a matter of law because Reilly's speech in the Munoz case was made pursuant to his official duties, and thus that speech was not protected by the First Amendment. In *Garcetti*, the Supreme Court described the inquiry into whether the plaintiff spoke pursuant to his official duties as "a practical one," noting that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither

necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424-25, 126 S.Ct. 1951. In that case, however, the parties "d[id] not dispute that Ceballos wrote his disposition memo pursuant to his employment duties." *Id.* at 424, 126 S.Ct. 1951.

Consistent with *Garcetti*, we thereafter held that "whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law." *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir.2007). In *Foraker*, we agreed with the district court's decision that Delaware state policemen who were disciplined for complaining to the State Auditor about hazardous conditions at a firing range spoke pursuant to their duties as government employees; we therefore applied *Garcetti* to foreclose their First Amendment claims. We noted that the district court had already considered whether the plaintiffs' speech was pursuant to their official duties, and we commented that "the proper resolution of challenges to the designation of such speech is to defer to the district court, because 'having presided over this and related litigation for several years, [the district court] may be in a better position to make the relevant factual determinations. . . .' " *Id.* at 240-41 (quoting *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir.2006), *cert. denied*, __ U.S. __, 127 S.Ct. 1918, 167 L.Ed.2d 567 (2007)).

In the case before us, there was no argument, let alone fact finding, by the District Court as to whether

Appendix A

Reilly's speech was made pursuant to his official duties. Although Flipping argues that Reilly has conceded that he was acting pursuant to his official duties,[4] Reilly disputes this characterization, particularly with respect to his trial testimony. Therefore, Reilly argues that the question whether he engaged in speech pursuant to his

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4. Flipping's argument is premised on a single exchange from Reilly's deposition during the District Court proceedings:

> [Q.] Did you tell Flipping, in that conversation in the Detective Bureau, I did what I did because it was my job, I was ordered to do it, I'm doing my job—I did my job?
>
> A. That was the—you know, that was the context of the conversation.
>
> Q. That is a fair summation of what thought you transmitted to Mr. Flipping, correct?
>
> A. Yeah.
>
> And what I received back from him was—the only thing he was concerned about was it wasn't our job to do it, you shouldn't have been involved, you know.

Flipping App. at 133. Because the page immediately preceding the passage reproduced here has not been included in the appendix, it is not entirely clear which aspects of Reilly's speech he agreed were part of his job. Moreover, this passage suggests that Flipping disagreed with Reilly as to whether Reilly's actions were in fact part of his official responsibilities. Finally, Reilly was speaking as to what he told Flipping, rather than what he believed.

official duties presents a factual issue that is not cognizable under the collateral order doctrine. We agree that some aspects of Reilly's speech in the context of the Munoz investigation require further factual development by the District Court. On the other hand, the fact of Reilly's sworn testimony at the Munoz trial is sufficiently developed on this appeal for us to consider as a matter of law whether that speech was made "pursuant to [his] official duties," *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951, so as to foreclose his retaliation claim, or whether that speech entitled Reilly to the protections of the First Amendment.

In analyzing Reilly's retaliation claim, the District Court asked whether Reilly's speech involved a matter of public concern and whether the *Pickering* balancing weighed in favor of Reilly. *See Reilly*, 427 F.Supp.2d at 514-15 (citing *Springer*, 435 F.3d at 275). We have stated that following *Garcetti*,

> [a] public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have "an adequate justification for treating the employee differently from any other member of the general public" as a result of the statement he made [i.e., the *Pickering* balancing test].

Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir.2006) (quoting *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951). *Garcetti* simply "narrowed the Court's jurisprudence in the area of employee speech" by further restricting the speech activity that is protected. *Foraker*, 501 F.3d at 241. Here, the District Court concluded that Reilly's speech was a matter of public concern and that the *Pickering* balancing favored Reilly. *See Reilly*, 427 F.Supp.2d at 515. Therefore, the effect of *Garcetti* in the context of this appeal is limited to the question whether Reilly spoke as a citizen when he testified at the Munoz trial.

It is axiomatic that "[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law." *Piemonte v. United States*, 367 U.S. 556, 559 n. 2, 81 S.Ct. 1720, 6 L.Ed.2d 1028 (1961); *accord United States v. Mandujano*, 425 U.S. 564, 576, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) (recognizing that "the duty to give testimony" is an "obligation imposed upon all citizens"); *United States v. Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("The duty to testify has long been recognized as a basic obligation that every citizen owes his Government."); *New York v. O'Neill*, 359 U.S. 1, 11, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959) ("A citizen cannot shirk his duty, no matter how inconvenienced thereby, to testify in criminal proceedings and grand jury investigations in a State where he is found."); *Blackmer v. United States*, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932) ("It is . . . beyond controversy that one of the duties which the citizen owes to his government is to support the

administration of justice by attending its courts and giving his testimony whenever he is properly summoned."); *Blair v. United States*, 250 U.S. 273, 281, 39 S.Ct. 468, 63 L.Ed. 979 (1919) ("[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned. . . .").

The Supreme Court has relied on this principle in rejecting attempts by citizens, regardless of their role in our society, to circumvent their obligation to comply with judicial process. For instance, in *Branzburg v. Hayes*, 408 U.S. 665, 686, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Court noted that the great weight of authority held that the so-called newsman's privilege "was outweighed by the general obligation of a citizen to appear before a grand jury or at trial . . . and give what information he possesses." Therefore, the Court concluded:

> we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, *like other citizens*, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91, 92 S.Ct. 2646 (emphasis added). Similarly, in *United States v. Nixon*, 418 U.S. 683, 708, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Court decided that the "presumptive privilege for Presidential communications" is not unyielding because every citizen has a duty to comply with the rule of law. The Court explained:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 709, 94 S.Ct. 3090. The notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent.

We have acknowledged the importance of this same principle when evaluating First Amendment retaliation claims. In *Pro v. Donatucci*, we considered whether Pro, an employee in the office of the Clerk of the Orphans' Court, could state a claim against Donatucci, the Register of Wills of Philadelphia County, on the basis that Pro's employment was terminated shortly after she

appeared in court pursuant to a subpoena to testify for Donatucci's wife in a divorce action against Donatucci. 81 F.3d at 1285. In accord with a line of cases from the Court of Appeals for the Fifth Circuit, we concluded that "Pro had a First Amendment right to respond to Mrs. Donatucci's subpoena to appear at the divorce proceeding." *Id.* at 1290.

We found persuasive the reasoning of our sister court that "it is the duty of every person to testify truthfully before a duly constituted tribunal" and that "these values, along with the first amendment values, would not be served if the fear of retaliation and reprisal effectively muzzled witnesses testifying in open court." *Id.* (quoting *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir.1987) (internal quotation marks and alterations omitted)). We also found persuasive that court's reasoning that testimony is offered "in a context that is inherently of public concern . . . . Employees either could testify truthfully and lose their jobs or could lie to the tribunal and protect their job security." *Id.* (quoting *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1578 (5th Cir.1989)). We reserved the question whether Pro's speech would have been protected "if she had appeared voluntarily" in court. *Id.* at 1291 n. 3.

A year later, we answered the question reserved in *Pro. See Green v. Philadelphia Housing Auth.*, 105 F.3d 882, 887 (3d Cir.1997). In that case, Green, a police officer for the Philadelphia Housing Authority Police Department, was transferred from a special unit within

the department to regular patrol duty after he voluntarily appeared as a witness at the bail hearing of a longtime friend's son. *Id.* at 884. Although Green refused to testify at the hearing after learning that the charges against his friend's son included organized crime activity, he was nonetheless transferred from the special unit after an unidentified officer notified the special unit's captain that Green had appeared as a character witness for a member of a crime organization. *Id.* We concluded that "there is a compelling reason to find Green's appearance to be a matter of public concern regardless of its voluntary nature. That reason, of course, is the integrity of the truth seeking process." *Id.* at 886. We elaborated, "[t]he utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for appearance and truthful testimony at such proceedings." *Id.* at 887.

Many courts of appeals have joined this court and the Court of Appeals for the Fifth Circuit in recognizing the fundamental role in-court testimony plays in our society and its importance to the question whether a public employee's speech is protected by the First Amendment. *See, e.g., Herts v. Smith,* 345 F.3d 581, 586 (8th Cir.2003) ("Subpoenaed testimony on a matter of public concern in ongoing litigation . . . can hardly be characterized as defeating the interests of the state . . . . Dr. Herts's speech therefore qualifies as protected speech."); *Catletti ex rel. Estate of Catletti v. Rampe,* 334 F.3d 225, 229-30 (2d Cir.2003) ("In this case the context of Catletti's speech—testimony offered at a

trial—is significant. . . . The paramount importance of judicial truth-seeking means that truthful trial testimony is almost always of public concern."); *Worrell v. Henry*, 219 F.3d 1197, 1204-05 (10th Cir.2000) ("[T]ruthful testimony is protected by the First Amendment and . . . a government employee may not be fired or subjected to other adverse action as a result of such testimony."); *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1505 (7th Cir.1994) (holding that "an employee summoned to give sworn testimony . . . has a compelling interest in testifying *truthfully* and the government employer can have an offsetting interest in preventing her from doing so only in the rarest of cases"); *cf. Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir.1998) ("By responding to the Board's invitation to testify at a public hearing and by cooperating with law enforcement investigators, Robinson and Marc spoke not in their capacity as . . . public employee[s], but as citizen[s] upon matters of public concern.") (citations and internal quotation marks omitted).

Despite the overwhelming weight of authority concluding that an employee's truthful testimony in court is protected by the First Amendment, we are aware of no precedential appellate decision after *Garcetti* answering the question whether truthful trial testimony arising out of the employee's official responsibilities constitutes protected speech.[5] Only one federal appellate

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5. The Court of Appeals for the Seventh Circuit recently held that a plaintiff's testimony at a legislative hearing was not protected because it "was given as an employee and not as a citizen. . . ." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir.2008). That issue is distinct from the one before us on appeal.

court has issued a precedential opinion even touching upon this issue. Specifically, the Court of Appeals for the Seventh Circuit concluded that a police officer's subpoenaed civil deposition testimony "was unquestionably not . . . part of what he was employed to do," and thus it was protected even though the officer testified about speech that was made pursuant to his official duties. *Morales v. Jones,* 494 F.3d 590, 598 (7th Cir.2007); *see also Fairley v. Fermaint,* 482 F.3d 897, 902 (7th Cir.2007) (noting that *Garcetti* did not apply to testimony given by county jail guards in inmate lawsuits because assisting prisoners in their litigation did not fall within the guards' official duties).

Here, however, Reilly, as an Atlantic City police officer, assisted a state investigation of a fellow officer and testified for the prosecution at the subsequent trial. Thus, the speech at issue on this appeal, Reilly's trial testimony, appears to have stemmed from his official duties in the investigation. The *Garcetti* opinion focused solely on the speech contained in Ceballos' internal memo, leaving to the court of appeals on remand the opportunity to consider whether Ceballos' conduct at the meeting and his testimony in court were entitled to First Amendment protection. 547 U.S. at 443-44, 126 S.Ct. 1951 (Souter, J., dissenting). In his dissent, Justice Souter recognized that these issues were not decided by the *Garcetti* majority, and cautioned that "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process." *Id.* at 444, 126 S.Ct. 1951 (Souter, J., dissenting).

Because *Garcetti* offers no express instruction on the application of the First Amendment to the trial testimony of a public employee, we turn to the settled principles discussed above: "[t]he duty to testify has long been recognized as a basic obligation that *every citizen* owes his Government." *Calandra*, 414 U.S. at 345, 94 S.Ct. 613 (emphasis added). The citizen's obligation to offer truthful testimony in court is necessary to protect the integrity of the judicial process and to insulate that process from outside pressure. *See Green*, 105 F.3d at 887 ("The utility of uninhibited testimony and the integrity of the judicial process would be damaged if we were to permit unchecked retaliation for . . . truthful testimony at such proceedings."); *cf. Nixon*, 418 U.S. at 709, 94 S.Ct. 3090 ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."). Much as the duty to testify is not vitiated by one's role as a newsman, *see Branzburg*, 408 U.S. at 690-91, 92 S.Ct. 2646, or as the President of the United States, *see Nixon*, 418 U.S. at 709, 94 S.Ct. 3090, the citizen's obligation to testify truthfully is no weaker when one is employed by the government in any other capacity. Thus, the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee. That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.

When a government employee testifies truthfully, s/he is not "simply performing his or her job duties," *Garcetti*, 547 U.S. at 423, 126 S.Ct. 1951; rather, the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence. Ensuring that truthful testimony is protected by the First Amendment promotes "the individual and societal interests" served when citizens play their vital role in the judicial process. *Id.* at 420, 126 S.Ct. 1951. Thus, the principles discussed in *Garcetti* support the need to protect truthful testimony in court.

Having concluded that Reilly's truthful testimony in court constituted citizen speech and that his claim is not foreclosed by the "official duties" doctrine enunciated in *Garcetti*,[6] we briefly address Appellants' three remaining challenges to the District Court's order denying them qualified immunity on Reilly's First Amendment retaliation claim.

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6. As discussed in *Pro*, "[w]e have not held that courtroom testimony should receive 'absolute' First Amendment protection." 81 F.3d at 1291 n. 4. Rather, courtroom testimony meets the threshold inquiry that speech be on a matter of public concern and, as we now hold, be offered in one's capacity as a citizen. Nonetheless, that conclusion does not end our analysis; rather, "[t]he interests of the employee in speaking and the employer in regulating the speech must then be balanced against one another, as in any First Amendment balancing context. . . ." *Id.* Therefore, our holding today does not obviate the need to engage in *Pickering* balancing. We address that balancing here to the extent that Appellants properly challenge the District Court's analysis of that issue.

First, Appellants argue that even if Reilly's speech may be protected by the First Amendment, that fact was not clearly established until the Supreme Court's decision in *Garcetti*, and therefore they are entitled to qualified immunity as a matter of law. This contention is without merit. The protected status of courtroom testimony was clearly established even at the time we decided *Pro*.[7] 81 F.3d at 1291-92. As we have explained in this opinion, *Garcetti* does not alter that conclusion. *Cf. Foraker*, 501 F.3d at 241 (commenting that *Garcetti* simply "narrowed the Court's jurisprudence in the area of employee speech").

Second, Snellbaker argues that Reilly is not entitled to First Amendment protection for his speech in the Munoz matter because his right to speak was outweighed by the police department's interest in disciplining Reilly for creating a hostile work environment. Because the *Pickering* balancing analysis presents a question of law, *see Baldassare*, 250 F.3d at 195, we have jurisdiction over this issue pursuant to the

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7. In fact, when Flipping and Snellbaker sued DiNoto in 1998, the district court relied on *Pro* and *Green* for the proposition that "the testimonies" they provided in the Munoz trial and other "judicial proceeding[s] are automatically of a public concern because, as in *Green*, they implicate the judicial and public interest in the integrity of the truth seeking process and the effective administration of justice." *McCullough*, 137 F.Supp.2d at 568. This further undermines their contention that the protected status of Reilly's speech in that same trial was not clearly established when they allegedly retaliated against him in 2003.

collateral order doctrine to the extent that it challenges the District Court's legal conclusions.

Reilly does not dispute that he was subject to discipline for the findings in the Flower report; rather, he argues that Flipping and Snellbaker used that occasion to punish him more severely than warranted (i.e., by increasing the recommended four-day suspension to a ninety-day suspension and demotion) in retaliation for his speech in the Munoz matter, including his testimony at trial. Where a plaintiff claims that the stated grounds for his/her discipline were a pretext for the discipline imposed, the court does not apply the *Pickering* balancing test solely to the speech that defendants claim motivated the disciplinary action, *see Versarge v. Twp. of Clinton*, 984 F.2d 1359, 1367-68 (3d Cir.1993), such as Reilly's violation of department regulations here. Rather, the court considers all of the speech that the plaintiff alleges is protected, *id.*, such as Reilly's testimony at the Munoz trial. With respect to the speech that is the basis of Reilly's retaliation claim, the District Court properly held that the public's interest in hearing testimony about police corruption outweighed Appellants' interest in maintaining order by disciplining Reilly for that speech.

To the extent that Snellbaker attempts to argue that his disciplinary recommendation was justified by Reilly's violations and was in no way connected to Reilly's speech in the Munoz matter, his argument is more properly viewed as a challenge to the factual issues of motivation and rebuttal. *See Monteiro v. City of Elizabeth*, 436 F.3d

397, 404-05 (3d Cir.2006) (whether "conduct violated clearly established law depended upon [defendant's] motivation" for alleged retaliation and there was sufficient evidence of motive to go to a jury). The District Court concluded that there was sufficient evidence to present these issues to the jury, and we do not have jurisdiction over that determination pursuant to the collateral order doctrine.

Moreover, Snellbaker provides no compelling support for his argument that the law was not clearly established in this area. The *Pickering* balancing test was clearly established at the time of the alleged retaliation, as was the notion of pretextual discipline in the context of a First Amendment retaliation claim. *See, e.g., Latessa v. N.J. Racing Comm'n,* 113 F.3d 1313, 1320 (3d Cir.1997) (considering whether employer's stated justification for non-renewal of plaintiff's employment was "mere pretext"). Therefore, we reject Snellbaker's argument to the extent that it raises a legal issue over which we may exercise jurisdiction on this appeal.

Third, Snellbaker argues that the District Court erred in leaving for the jury the question whether there was a causal connection between Reilly's speech in the Munoz matter and any alleged adverse employment action by Snellbaker. He argues that this is a legal issue and that the length of time between Reilly's speech in the Munoz matter and the allegedly retaliatory actions forecloses the possibility of a First Amendment violation here. But the precedents upon which Snellbaker relies

focus on whether timing alone is sufficient to draw an inference of retaliation. *See, e.g., Estate of Smith v. Marasco*, 318 F.3d 497, 512-13 (3d Cir.2003); *Brennan v. Norton*, 350 F.3d 399, 420 (3d Cir.2003). Here, the District Court relied on evidence in addition to timing; specifically, it drew an inference from the evidence that Snellbaker was aware of Reilly's role in the Munoz investigation, that he was frustrated by Flower's disciplinary recommendation, and that he conspired with Flipping to force Reilly into retirement. *Reilly*, 427 F.Supp.2d at 516. The facts identified by the District Court were sufficient to establish a prima facie case against Snellbaker. We may not further "consider whether the district court correctly identified the set of facts that the summary judgment record is sufficient to prove." *Forbes*, 313 F.3d at 147 (citation and internal quotation marks omitted).

In summary, we conclude that the District Court appropriately denied Appellants' motions for summary judgment on the basis of qualified immunity with respect to Reilly's First Amendment retaliation claim.

VI.

Flipping and Snellbaker also challenge the District Court's order denying them qualified immunity on Reilly's procedural due process claim. The District Court framed the issue presented by that claim as "whether Reilly was afforded an appropriate level of pre-deprivation procedural due process before the decision to increase his punishment from a 4-day suspension to

a 90-day suspension, a reduction in rank, and removal from the promotion list." *Reilly*, 427 F.Supp.2d at 517.

The District Court considered two separate theories of liability: (1) that Flipping relied on Reilly's disciplinary history without giving Reilly notice and an opportunity to rebut that evidence; and (2) that the final disciplinary decision in Reilly's case was made by an individual without authority to make that decision. *See id.* at 518-20. The District Court concluded that Flipping and Snellbaker were entitled to qualified immunity on the first theory of liability because at the time of Flipping's letters this court had not decided that a government employee was entitled to the opportunity to respond to a punishment decision, a determination we made in 2005. *Id.* at 520-21. That issue is not before us on this appeal. Instead, we limit our discussion to the process accorded by New Jersey's regulatory scheme.

Under the procedure for "major discipline" of civil servants set forth in the New Jersey Administrative Code, *see* N.J. Admin. Code §§ 4A:2-2.1 to .12, "[a]n employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline," *id.* § 4A:2-2.5(a). Such a hearing "shall be held before the appointing authority or its designated representative." *Id.* § 4A:2-2.6(a). "Within 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision

on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action." *Id.* § 4A:2-2.6(d). The employee may then appeal the Final Notice of Disciplinary Action to the Merit System Board, *id.* § 4A:2-2.8, and may request a hearing from that body, *id.* § 4A:2-2.9.

Instead of reviewing the post-deprivation process that would have been available to Reilly had he appealed the disciplinary decision in his case, the District Court focused on "who ha[d] authority to make the final disciplinary decision, and who actually made the decision in Reilly's case." *Reilly,* 427 F.Supp.2d at 519. Because Flipping and Snellbaker had different theories as to who had the final disciplinary authority, the District Court concluded:

> questions of fact exist as to whether the person with legal authority to make the final discipline decision was actually the person to make the decision in Reilly's case. If Reilly is able to prove at trial that someone other than the person vested with authority to make final discipline decisions made the decision as to his discipline, he will have proven a procedural due process violation.

Id. at 520 (citing *Sarteschi v. Burlein,* 508 F.2d 110, 115 n. 7 (3d Cir.1975)).

"A decision on qualified immunity . . . 'will be premature when there are unresolved disputes of

historical fact relevant to the immunity analysis.' " *Wright v. City of Philadelphia,* 409 F.3d 595, 599 (3d Cir.2005) (quoting *Curley v. Klem,* 298 F.3d 271, 278 (3d Cir.2002)). Nonetheless, deciding the issue of qualified immunity at the summary judgment stage may be appropriate and is "reviewable on appeal where the dispute does not turn upon 'which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of "clearly established" law.' " *Id.* (quoting *Johnson v. Jones,* 515 U.S. 304, 311, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995)). In conducting this inquiry, courts are not confined to the allegations of the complaint, but instead may "analyz[e] the evidence adduced by plaintiff as to the conduct of the defendants." *Brown v. Grabowski,* 922 F.2d 1097, 1111 (3d Cir.1990) (citing *Anderson v. Creighton,* 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Flipping and Snellbaker argue that because Reilly resigned before the Mayor or his designee took any action whatsoever, Reilly effectively abandoned the process available to him, primarily the right to appeal any such action to the Merit System Board, and cannot now claim that he was deprived of legal process. Having reviewed the record before us and the relevant precedents, we conclude that Appellants are correct on that issue.

In *Alvin v. Suzuki,* 227 F.3d 107, 110 (3d Cir.2000), Alvin, a tenured professor at the University of Pittsburgh, brought a civil rights action alleging that the university's administrators denied him the rights inhering in his tenure. We rejected Alvin's procedural

due process claims on the ground that he failed to follow the grievance procedures set forth in the faculty handbook. *Id.* at 111. We explained, "[i]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Id.* at 116. We carefully distinguished this requirement from exhaustion, explaining that taking advantage of available processes is not a procedural hurdle, but is akin to an element of the claim because "a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies." *Id.*

We also rejected Alvin's argument that his use of formal procedures would have been futile. We acknowledged that "[w]hen access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim." *Id.* at 118. Applying that standard to the facts presented, we stated, "since Alvin never invoked the second part of the processes available to him, which appear facially adequate, we will not hold that this step would have been unavailing (in procedure, if not in substance), absent concrete evidence supporting such a contention." *Id.* We concluded that Alvin could not "forego attempting to use [the bypassed] processes simply because he thinks that they will be followed in a biased manner." *Id.* at 119. We further explained that an allegation of biased pre-deprivation

procedures is insufficient to prove futility in "the presence of . . . apparently adequate post-termination remedies. . . ." *Id.* (citing *McDaniels v. Flick*, 59 F.3d 446, 460-61 (3d Cir.1995)).

McDaniels is equally instructive. McDaniels was a tenured professor at Delaware County Community College. *McDaniels*, 59 F.3d at 448. The college's board of trustees voted to terminate McDaniels' employment after an allegedly biased pre-termination hearing, but McDaniels did not appeal to or ask for a hearing before the board of trustees as required by the college's regulations. *Id.* at 451-53. We denied McDaniels' procedural due process claim, holding:

> a discharged employee cannot claim in federal court that he has been denied due process because his pretermination hearing was held by a biased individual where he has not taken advantage of his right to a post-deprivation hearing before an impartial tribunal that can rectify any possible wrong committed by the initial decisionmaker.

Id. at 460.

Here, the disputed issue of fact identified by the District Court, "whether the person with legal authority to make the final discipline decision was actually the person to make that decision in Reilly's case," *Reilly*, 427 F.Supp.2d at 520, is immaterial to whether Reilly may state a procedural due process claim where he

resigned from the police department instead of using the post-deprivation procedures available to him. Those procedures entailed invoking Reilly's statutory right to appeal a Final Notice of Disciplinary Action to the Merit System Board and to request a hearing from that body. *See* N.J. Admin. Code §§ 4A:2-2.8 to .9.

Reilly does not allege, nor has he produced evidence, that the Merit System Board was biased against him, unavailable, or patently inadequate. He completely ignores the existence of statutory post-deprivation procedures that serve as a counterbalance to any discipline imposed on New Jersey civil servants, such as that allegedly imposed by Flipping and Snellbaker. Reilly does not provide any authority for the proposition that a civil servant may state a valid due process claim where s/he has resigned before taking advantage of any post-deprivation procedures available. Nor do *Sarteschi* or *Gilbert v. Homar*, 520 U.S. 924, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997), both of which were relied upon by the District Court, support Reilly's position.

Although *Sarteschi* asserts the uncontroversial proposition that a procedural due process right arises to protect one's expectation of proper procedures before discharge, that decision says nothing about a plaintiff's obligations to follow post-deprivation procedures before filing suit for an alleged violation of his/her right to pre-deprivation procedures. 508 F.2d at 115 n. 7. Thus, *Sarteschi* does not conflict with *Alvin*. The constitutional right to process does not permit one to forego post-deprivation procedures that may remedy any defect in

the initial procedures without demonstrating that the post-deprivation procedures are inadequate.

Gilbert is equally unavailing. In that decision, the Supreme Court explained that pre-deprivation process is not invariably required. 520 U.S. at 930, 117 S.Ct. 1807 ("This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause."). Therefore, defendant, a university police officer who had been charged with a felony, was not entitled to a hearing before being suspended, *id.* at 933, 117 S.Ct. 1807, because "in the case of a suspension there will be ample opportunity to invoke [the decision-maker's] discretion later," *id.* at 934-35, 117 S.Ct. 1807. The Court then addressed the distinct question whether defendant "was provided an adequately prompt *post*-suspension hearing. . . ." *Id.* at 935, 117 S.Ct. 1807.

Rather than supporting the proposition that a pre-deprivation procedure may be challenged without consideration of any available post-deprivation procedures, *Gilbert* makes clear that the availability and validity of any pre-deprivation process must be analyzed with reference to the context of the alleged violation and the adequacy of available post-deprivation procedures. Reilly did not attempt to invoke any of the post-deprivation procedures available to him, nor does he contest their adequacy. Therefore, he cannot state a valid procedural due process claim as a matter of law.

In summary, we will reverse the District Court's order that Appellants are not entitled to qualified immunity at the summary judgment stage with respect to Reilly's Fourteenth Amendment procedural due process claim.[8] Because Reilly cannot state a claim under the Fourteenth Amendment, defendants are entitled to qualified immunity.

VII.

Finally, Appellants ask us to reverse the District Court's decision denying them summary judgment on Reilly's CEPA claim and his claim for punitive damages. The courts of appeals may exercise pendent appellate jurisdiction "over issues that are not independently appealable but that are intertwined with issues over which the appellate court properly and independently exercises its jurisdiction." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 202-03 (3d Cir.2001) (citations omitted).

Snellbaker argues that Reilly's CEPA claim is intertwined with his First Amendment claim because the District Court denied summary judgment on the CEPA claim for the same reasons that it denied summary

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8. In light of our holding that Flipping and Snellbaker are entitled to summary judgment on the procedural due process claim, we need not discuss Appellants' remaining arguments for reversal of the District Court's decision on this count.

judgment on the First Amendment claim.[9] We have concluded that the District Court properly denied Appellants summary judgment on Reilly's First Amendment claim. *See supra* Part V. Therefore, to the extent that Reilly's CEPA claim may be intertwined with his First Amendment claim, we would affirm the District Court's denial of summary judgment.[10]

Flipping argues that Reilly's punitive damages claim is intertwined with his First and Fourteenth Amendment claims because if the court finds that Appellants are entitled to qualified immunity on those claims, there would be no outrageous conduct on which to base punitive damages under 42 U.S.C. § 1983. However, because we have concluded that the District Court's denial of summary judgment on the First Amendment claim should be affirmed, Flipping's argument would fail even if we exercised pendent appellate jurisdiction over the punitive damages issue.

In summary, we decline to exercise pendent appellate jurisdiction over the remaining arguments raised by Flipping and Snellbaker on this appeal.

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9. Flipping made a similar argument regarding the CEPA claim in his principal appellate brief, but withdrew that argument in his reply brief.

10. We do not decide that the CEPA claim is sufficiently intertwined with the First Amendment claim to exercise pendent appellate jurisdiction over the former. We only decide that our affirmance of the latter would require affirmance of the former if those claims were in fact sufficiently intertwined to invoke our jurisdiction.

Appendix A

VIII.

For the reasons set forth, we will affirm the District Court's denial of summary judgment with respect to the First Amendment retaliation claim and reverse the denial of summary judgment with respect to the Fourteenth Amendment due process claim.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 5, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH E. IRENAS
CIVIL ACTION NO. 03-5975 (JEI)

ROBERT REILLY,

Plaintiff,

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING; JOSEPH MCCULLOUGH; and ARTHUR SNELLBAKER,

Defendants.

OPINION

IRENAS, Senior District Judge.

Plaintiff Robert Reilly ("Reilly") brings this suit against his former employer and supervisors for alleged employment retaliation. Presently before the Court are the Defendants' Motions for Summary Judgment.

Appendix B

I.

In June, 2003, Reilly retired from the Atlantic City Police Department as a Sergeant. Reilly retired pursuant to a "Consent Agreement" between Reilly and his employer, Defendant City of Atlantic City ("Atlantic City" or "the City"), which allowed Reilly to retire with his full pension instead of facing disciplinary sanctions-including a 90-day suspension, a reduction in rank to patrolman, and removal from the promotion list-resulting from an investigation into sexual harassment charges made by a female police officer against Reilly. (Defs.Ex.O)[1] Reilly asserts that this adverse employment action was taken against him because of his involvement several years earlier in an investigation of alleged misconduct by Defendant Robert Flipping ("Flipping").

Between 1989 and 1991 Reilly was a detective in the "investigation unit" of the Atlantic City Police Department. During this time, Reilly was assigned to an investigation that eventually led to the trial of Patrolman Dennis Munoz ("Munoz") in 1993 on criminal charges of official misconduct, promoting prostitution, and accepting bribes.[2] Flipping was Munoz's supervisor

1. Defendants Flipping and McCullough have submitted exhibits in support of their Motion for Summary Judgment which the other Defendants also rely upon. Therefore, we will refer to the Exhibits attached to the Flipping / McCullough motion as "Defs. Ex." Other exhibits will be separately referenced where necessary.

2. The outcome of the trial is not apparent from the record.

and close friend at the time of the alleged crimes and testified on Munoz's behalf at the trial. Reilly testified at the Munoz trial on behalf of the prosecution.[3] (Defs. Ex. E at p. 100)

Flipping was never charged or disciplined in connection with the events surrounding the Munoz trial.[4] Flipping knew that he was a target in the Munoz investigation, however, and he specifically knew that the state prosecutor had questioned witnesses about Flipping before the Munoz grand jury. (Pls. Ex. P at p. 174-76) A local newspaper covering the Munoz trial also reported that "Flipping was one of the state's prime targets in its investigation . . . and could still face charges once the Munoz case is decided, both sides in the trial have indicated." (Pls.Ex. R)[5]

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3. Reilly had established a professional relationship with an informant who cooperated in the investigation.

4. Indeed, it appears from the record that Flipping was promoted to captain in the year following the Munoz trial, and Flipping has earned subsequent promotions since that time.

5. Reilly also apparently participated in other more minor investigations involving Flipping, including a drug investigation involving Flipping's father's funeral parlor and an investigation into irregularities in Flipping's time cards. However, no charges or disciplinary actions were ever taken against Flipping, and Reilly has produced no evidence that Flipping knew about these other investigations. (Defs. Ex. E at p. 109, 113)

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In September, 2002, Flipping was promoted to Director of Public Safety.[6] While the record is unclear whether the Public Safety Director has the final authority to make promotion decisions or disciplinary decisions, it is clear that Flipping, as Public Safety Director, had a leading role in the decision in Reilly's case. Police officer Timothy Friel ("Friel")[7] testified at his deposition that based on his knowledge of the events surrounding the Munoz trial and conversations with Flipping around the time Flipping became Public Safety Director, Friel believed that Flipping wanted to prevent Reilly's promotion. (Pls.Ex.B) Specifically, Friel stated,

> So there was a dislike, and Flipping being very close-very, very close with Munoz for his whole career, in my opinion, was very pissed off about it and really, really disliked [Reilly] because of that. . . . It was my opinion that when Flipping became the director of public safety and had some say as to whether it was going to be promotions or not, it was his first true opportunity to get even with Reilly for that investigation with Dennis Munoz.

(Pls. Ex. B at 26-27)

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6. Flipping eventually stepped down from his director position in March or April, 2004, for reasons unrelated to the present suit. (Pls. Ex. D at 41)

7. Friel was next in line for a promotion after Reilly.

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According to Reilly, Flipping's opportunity came in February, 2003, when an independent hearing officer found that Reilly had violated Atlantic City Police Department Rules and Regulations prohibiting sexual harassment.[8] Though not entirely clear in the record, it appears that Reilly's hearing was conducted pursuant to the "major discipline" procedure for civil service employees set out in the New Jersey Administrative Code. *See* N.J. Admin. Code § 4A:2-2.5- 2.6; *see generally* N.J. Admin. Code §§ 4A:2-1.1- 4A:2-6.2. Thus, a "designated representative," in this case, Hearing Officer Willis Flower, Esq., presided over the hearing, where both Atlantic City and Reilly were represented by counsel. *See* N.J. Admin. Code § 4A:2-2.6(a)-(b).

In a 28-page opinion, Hearing Officer Flower thoroughly summarized what took place at the hearing, including the testimony of the complaining officer, Reilly, and at least eleven other witnesses. (Defs.Ex.I) Hearing Officer Flower made findings of fact and conclusions of law after having considered briefs submitted by both sides. (*Id.*) Specifically, Hearing Officer Flower found that Reilly "made derogatory comments involving women" in the complainant's presence which "embarrassed and intimidated" her.[9] (*Id.* at 10-11)

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8. The finding was based on events and charges that pre-dated Officer Flipping's promotion to Director of Public Safety.

9. The complainant testified that the derogatory comments were never specifically directed towards her. Instead, Reilly made comments about women's anatomy in general. (Defs. Ex. I at 3)

He also found that Reilly had engaged in other conduct that, while not necessarily sexual in nature, "contributed to a hostile work environment that intimidated, derided and belittled" the complainant. (*Id.* at 11) These findings notwithstanding, Hearing Officer Flower also found that Reilly had not intended to intimidate the complainant. (*Id.* at 21) He then recommended: "In my judgment, dismissal, reduction in rank or lengthy suspension is not called for here. . . . My recommendation for appropriate discipline is a four day suspension without pay." (*Id.*)

Shortly after receiving the opinion, Defendant Police Chief Arthur Snellbaker ("Snellbaker") discussed it with Flipping, his immediate supervisor, who also received the opinion. Snellbaker expressed "consternation" over the opinion and asked Flipping whether he was required to follow the disciplinary recommendation, which Snellbaker considered "unacceptable." (Pls. Ex. D at 48-50) Flipping stated that he believed that Snellbaker was responsible for enforcing the department rules and regulations, and indicated that Flipping would await Snellbaker's recommendation.[10] (*Id.*)

Accordingly, on February 24, 2003, Snellbaker drafted a memorandum to Flipping in which he quoted Hearing Officer Flower's recommendation but made his own recommendation that Reilly should be reduced in rank. (Defs.Ex.J) He based this recommendation on his

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10. Flipping and Snellbaker may have discussed whether Flowers had authority to make a disciplinary recommendation at all, but the record is not entirely clear on this point.

view that Reilly's conduct was "egregious and reprehensible" especially because it was directed towards "the most impressionable of his subordinates." (*Id.*) Snellbaker explained, "[t]he essence of leadership is dignity. No one will willingly follow a clown or 'one of the boys' into harm's way."[11] (*Id.*)

After receiving Snellbaker's recommendation, Flipping reviewed Reilly's disciplinary history and drafted his own memorandum to the department's business administrator recommending that Reilly be removed from the promotion list for his negative "prior employment history." (Defs.Ex.L) Flipping wrote, "While it is clear that almost fifteen years have passed since Reilly's last disciplinary incident [not including the recent sexual harassment case], it should be noted that he has had assignments during that period that removed him from the day to day type of public contact. Reilly was placed in plain clothes type activities where supervision is in large measure *laissez fair.*" (*Id.* at 2) He continued,

> Sergeant Reilly has exhibited behavior throughout his career that indicates racism, bigotry, sexism, lack of impartiality toward the public, irresponsibility, bringing the department into disrepute, failures to perform lawful duties from competent authority as

11. Reilly alleges that Snellbaker disliked Reilly because of his involvement in the Munoz investigation and his close association with another officer whom Snellbaker disliked.

> directed and failures to treat others with respect. The seeming 'hiatus' during the middle of his career should not mislead anyone into believing that this is a history of unrelated or isolated incidents or that Reilly's behavior has changed or improved. Clearly the most recent incidents belie that argument. For reasons unknown (perhaps related to previous administrations' lapse or malaise) no appropriate action was taken against Reilly's insidious behavior. This administration must rise up and confront this situation and set the matter right.

(*Id.* at 3)

Reilly's disciplinary record, which dates back to March, 1979, has a total of eight entries, all of which are suspensions.[12] (Pls.Ex.I) Among those eight, four were 3-day suspensions resulting from failing to honor a subpoena. (*Id.*) Reilly was suspended once, in 1979, for "remarks of a racial nature" which were made in connection with a "falsified report" and poor "conduct toward the public." (*Id.*)

Flipping did not review Reilly's personnel file which was maintained separately from the disciplinary records. Reilly's personnel file contained, among other things,

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12. It is undisputed that the longest of the eight suspensions was rescinded and should not have appeared on Reilly's record. However, it is also undisputed that Flipping was not aware of the error.

his most recent Employee Performance Evaluation in which his overall job performance was rated as "Exceeds Expectations," the highest of the available ratings. (Pls.Ex.K) Reilly's direct supervisor further commented, "[t]he only way Sgt. Reilly's job performance could be improved is promotion." (*Id.*)

In a separate memorandum to the City business administrator, dated the same day as the above-quoted Flipping memorandum, Flipping recommended that Reilly's punishment should include both Flipping's recommended removal from the promotion list and Chief Snellbaker's recommended demotion. (Defs.Ex.M) Flipping further stated, "had prior administrators acted prudently, I believe that Reilly should have been terminated prior to this matter." (*Id.*)

City Solicitor Smoger and Personnel Director Upshaw reviewed Flipping's recommendations and Hearing Officer Flower's opinion. (Defs.Ex.N) In a memorandum dated March 26, 2003, City Solicitor Smoger advised, "Personnel Director Upshaw and I concur with your assessment and finding and jointly request that you implement the appropriate procedures in this matter." (*Id.*) There is no evidence in the record that either Smoger or Upshaw reviewed Reilly's disciplinary record or any other documentation other than Flipping's recommendation and Hearing Officer Flower's opinion.

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Reilly asserts claims against Defendants City of Atlantic City, Flipping, McCullough[13] and Snellbaker pursuant to 42 U.S.C. § 1983 for violation of his Fourteenth Amendment procedural due process and First Amendment freedom of expression rights.[14] He also asserts against these Defendants claims of conspiracy to violate his civil rights pursuant to 42 U.S.C. § 1985, common law civil conspiracy, and retaliation in violation of New Jersey's Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 et seq. ("CEPA").[15] Reilly seeks compensatory and punitive damages.[16] We have subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

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13. The parties submitted a consent order, which this Court approved on October 31, 2005, dismissing Defendant McCullough from the case.

14. Flipping and Snellbaker are sued in both their official and individual capacities.

15. The remaining claims asserted in the Complaint have either been dismissed by the Court, *see Reilly v. City of Atlantic, et al.*, No. 03-5975, Order of June 8, 2004, or voluntarily dismissed by Reilly.

16. Reilly also seeks an order "directing defendants to cease any further harassment of, or retaliation against, plaintiff for the exercise of her [sic] constitutional rights of political participation." (Compl. at p. 14) The Court is somewhat puzzled by this request given that Reilly retired and does not seek reinstatement. Reilly does not allege that he has suffered any negative treatment since his retirement.

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II.

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. Am. Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir.1986). " 'With respect to an issue on which the non-moving party bears the burden of proof, the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.' " *Conoshenti v. Public Serv. Elec. & Gas,* 364 F.3d 135, 145-46 (3d Cir.2004) (quoting *Celotex*). The role of the Court is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Appendix B

III.

A.

Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

We will first discuss the claims against Flipping and Snellbaker and then address the issue of Atlantic City's liability.

(1)

Reilly contends that Defendants severely increased the discipline he was to receive for the sexual ha ssment incident, which effectively forced his retirement, in retaliation for his participation in the Munoz investigation and trial.

The applicable First Amendment retaliation analysis is well established in this Circuit. "The plaintiff must first demonstrate that s/he engaged in protected activity, i.e. speech that addresses a matter of public concern. We then employ the [*Pickering*] balancing test

to determine whether an employee's interest in the speech outweighs the state's countervailing interest as an employer in promoting workplace efficiency and avoiding workplace disruption. Next the plaintiff must prove that the protected activity was a substantial or motivating factor in the allegedly retaliatory action. Thereafter, the burden shifts to the employer to demonstrate that the allegedly retaliatory action would have been taken absent the protected conduct." *Springer v. Henry,* 435 F.3d 268, 275 (3d Cir.2006).

Despite Defendants' assertions to the contrary, we easily find that Reilly engaged in protected conduct. In *Baldassare v. State of New Jersey*, the Third Circuit held that a law enforcement officer's internal investigation into other officers' alleged criminal wrongdoing was activity protected by the First Amendment. 250 F.3d 188, 195-97 (3d Cir.2001). The Court explained, "[o]ur jurisprudence makes clear that an internal investigation into the alleged criminal actions of public employees falls squarely within core public speech." *Id.* at 197. Because the plaintiff officer's "investigation sought to bring to light actual or potential wrongdoing or breach of public trust by the officers he investigated," the Court held that the plaintiff's "conduct and expression in the internal investigation . . . constituted a matter of public concern." *Id.*

Thus, Reilly's participation in the internal investigation of alleged criminal wrongdoing within the Atlantic City Police Department is protected by the First Amendment. Indeed, Reilly's case is even more clear

because his protected activity went beyond conducting an official internal investigation. Reilly testified at the Munoz trial. Testifying at a criminal trial is clearly protected speech. *See Pro v. Donatucci*, 81 F.3d 1283, 1291 n. 4 (3d Cir.1996) (holding that courtroom testimony "raises the speech to a level of public concern regardless of its content."); *see also McCullough, Flipping, and Snellbaker v. City of Atlantic City et al.*, 137 F.Supp.2d 557, 568 (D.N.J.2001) (holding that Flipping's testimony at Munoz trial was protected speech).[17]

We also find that the balance of interests favors Reilly. *Baldassare* is analogous on this issue as well. Weighing in favor of Reilly, "the public's interest in exposing potential wrongdoing by public employees is especially powerful." *Baldassare*, 250 F.3d at 198.

On the other hand, Defendants here "bear a truly heavy burden" because "the more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made." *McGreevy v.*

17. To the extent Reilly bases his retaliation claim against Snellbaker on Snellbaker's alleged dislike of another officer with whom Reilly was friends we note that such evidence without more, does not establish an actionable claim. *See Ambrose v. Township of Robinson*, 303 F.3d 488, 494-96 (3d Cir.2002) (plaintiff-police officer's "perceived support" of another officer was not protected conduct). However, for the reasons explained above and below, Reilly's participation in the Munoz investigation and trial may serve as the basis for Snellbaker's liability, provided Reilly successfully proves the other elements of his retaliation claim at trial.

Stroup, 413 F.3d 359, 365 (3d Cir.2005). In *Baldassare* the Court explained, "[a]n employee who exposes corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." 250 F.3d at 200 (internal quotations omitted).[18] Thus, we conclude that the interest in Reilly's expression outweighs the Defendants' interest in avoiding disruption.

With regard to the remainder of the First Amendment analysis, it is for the fact-finder to decide: (a) whether Reilly's increased punishment was substantially motivated by his participation in the Munoz case and (b) whether his increased punishment would have occurred in the absence of his participation. *See Baldassare*, 250 F.3d at 195; *McGreevy*, 413 F.3d at 365-66. Thus our inquiry at this stage of the litigation is limited to whether Reilly has met his burden of establishing a *prima facie* case. *McGreevy*, 413 F.3d at 365-66. We hold that he has.

In addition to his own testimony in support of the alleged retaliation, Reilly presents the testimony of Officer Friel, who stated he believes, based on conversations with Flipping, that Flipping wanted to

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18. We also note that Reilly participated in the Munoz investigation because he was assigned to the project by the Atlantic City Police Department. Thus, we are inclined to give less weight to any resulting disruption in the department.

prevent Reilly's promotion because of his involvement in the Munoz case. Thus, Reilly has established a *prima facie* case against Flipping.[19]

We also conclude that Reilly has established a prima facie case against Snellbaker. Although not explicit in the record, we draw the reasonable inference that Snellbaker knew about the Munoz case and Reilly's participation in it. The trial received more than passing media attention and Reilly has established that many people within the police department knew he was involved in the case and openly expressed their disapproval of his involvement. Moreover, Flipping and Snellbaker had at least one conversation specifically addressing Hearing Officer Flower's disciplinary recommendation, and both men were dissatisfied with the recommendation. Reilly contends that Flipping and Snellbaker conspired to force him into retirement. Viewing the facts as a whole in the light most favorable to Reilly, we hold that he has put forth sufficient evidence to create a triable issue of fact with regard to Snellbaker's involvement in the alleged retaliation.

We further hold that Flipping and Snellbaker are not entitled to qualified immunity on the First

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19. Reilly repeatedly suggests that "the patent excessiveness" of Flipping's final disciplinary recommendation "can only be explained as retaliatory." (Pls. Br. at 11-12) While we consider Flipping's recommendation highly relevant to, and probative of, the retaliation issue, the lone fact that the recommendation greatly exceeded the hearing officer's recommendation does not itself suffice to establish a *prima facie* case.

Amendment claim. "The doctrine of qualified immunity shields government officials from civil liability 'as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *McGreevy*, 413 F.3d at 363 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). " 'There must be sufficient precedent at the time of the action, factually similar to the plaintiff's allegations, to put the defendant on notice that his or her conduct is constitutionally prohibited.' " *McKee v. Hart*, 436 F.3d 165, 171 (3d Cir.2006) (quoting *McLaughlin v. Watson*, 271 F.3d 566 (3d Cir.2001)).

As discussed above, *Baldassare*, decided in 2002, is factually similar to Reilly's case. Thus, a reasonable official in Flipping's or Snellbaker's position in 2003 would have understood that increasing Reilly's punishment in retaliation for his participation in the Munoz investigation and trial violated Reilly's First Amendment rights.

(2)

Reilly also asserts that Defendants deprived him of procedural due process by imposing a more severe penalty for the sexual harassment incident without providing notice and opportunity to be heard. The issue presented is whether Reilly was afforded an appropriate level of pre-deprivation procedural due process before the decision to increase his punishment from a 4-day

suspension to a 90-day suspension, a reduction in rank, and removal from the promotion list.[20]

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20. For the purposes of Defendants' motions only, they concede that "as a civil servant, Plaintiff had a constitutionally protected property interest and was entitled to procedural due process prior to any disciplinary action being taken against him." (Flipping Br. at 5)(see also Snellbaker Br. at 8; Atlantic City Br. at 3)(specifically incorporating Flipping's brief by reference).

Notwithstanding Snellbaker's incorporation of Flipping's concession in his opening brief, Snellbaker attempts to dispute this point in his reply brief. While we question whether Snellbaker may effectively withdraw a concession earlier made (albeit by former counsel), we hold that Reilly does have a protectable property interest in his civil service position. *See Kelly v. Borough of Sayreville,* 107 F.3d 1073, 1077 (3d Cir.1997) (relying on N.J.S.A. § 40A:14-147 to conclude that a New Jersey police officer "undoubtedly had a property interest in his position."). Moreover, to the extent that Snellbaker attempts to assert that the Court already resolved this issue in Defendants' favor when ruling upon their motion to dismiss, we note that we dismissed Reilly's *substantive* due process claim for failure to allege a protectable property interest. Protectable property interests under the substantive and procedural due process clauses are not co-extensive. *See Nicholas v. Penn. State Univ.*, 227 F.3d 133, 140 (3d Cir.2000) ("not all property interests worthy of procedural due process protection are protected by the concept of substantive due process. Rather, to state a substantive due process claim, a plaintiff must have been deprived of a particular quality of property interest.")(internal citations omitted); *see also McCullough, Flipping and Snellbaker*, 137 F.Supp.2d at 565 (holding that Snellbaker's asserted property interest in his job was not an interest

(Cont'd)

Appendix B

Some procedural background is necessary to understand Reilly's procedural due process claim. The New Jersey Administrative Code sets forth the "major discipline" procedure for civil service employees. *See* N.J. Admin. Code § 4A:2-2.5-2.6; *see generally* N.J. Admin. Code §§ 4A:2-1.1-4A:2-6.2. The disciplinary process is initiated by "serving" on the employee a "Preliminary Notice of Disciplinary Action" from the "appointing authority"[21] which sets forth the "charges and statement of facts supporting the charges." § 4A:2-2.5(a). The employee must request a "departmental hearing" on the matter within five days of receiving the Preliminary Notice or else the hearing is deemed waived. § 4A:2-2.5(d). The hearing, if requested, takes place before "the appointing authority or its designated representative." § 4A:2-2.6(a). The employee is entitled to be represented by counsel and the parties "have the opportunity to review the evidence supporting the charges and present and examine witnesses." § 4A:2-2.6(b)-(c). "Within 20 days of the hearing, or such

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protected by the substantive due process clause). Thus our ruling that Reilly has a property interest sufficient to support a procedural due process claim is entirely consistent with our prior ruling that he had not alleged a property interest sufficient to sustain a substantive due process claim.

21. The "appointing authority . . . means a person or group of persons having power of appointment or removal." *See* N.J. Admin.Code 4A:1-1.3. As we will discuss at some length below, it appears that the Mayor of Atlantic City or his designee is the "appointing authority" in this case.

additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action." § 4A:2-2.6(d).[22] What occurred in the time between the hearing and the decision on the charges, and who made the decision, are at issue in this case.[23]

We apply the balancing test of *Mathews v. Eldridge* to determine whether the process afforded Reilly was adequate. Thus, we must weigh Reilly's "private interest that will be affected by the official action," the "risk of erroneous deprivation" of the interest through the

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22. An employee may appeal the Final Notice of Disciplinary Action to the Merit System Board, and a hearing on the appeal may be held pursuant to N.J. Admin. Code §§ 4A:2-2.8-2.9. However, because Reilly challenges the adequacy of his *pre*-deprivation process, we need not further elaborate on the post-deprivation process that would have been available to Reilly. *See Gilbert v. Homar*, 520 U.S. 924, 935, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997); *Solomon v. Phila. Housing Auth.*, 143 Fed.Appx. 447, 455 (3d Cir.2005)("we think Appellant should have been accorded the minimal pre-deprivation process of notice and opportunity to be heard. . . . Regardless of whether Appellant could have challenged the suspension through the grievance procedure after he had already been suspended does not remove all need for basic pre-deprivation *Goss* process.").

23. It is important to note that Reilly does not challenge the events leading up to and including the hearing itself. Thus our inquiry is limited to the internal decision process occurring after Hearing Officer Flower's decision.

procedures used, "the probable value of additional or substitute procedural safeguards" and the "government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail." 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Gilbert v. Homar*, 520 U.S. 924, 931-32, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997).

Reilly has an interest in the continuation of his pay. *See Gilbert*, 520 U.S. at 932, 117 S.Ct. 1807, *Solomon v. Phila. Housing Auth.*, 143 Fed.Appx. 447, 454 (3d Cir.2005). In determining how much weight to accord Reilly's interest we must consider the length and finality of the deprivation. *See Gilbert*, 520 U.S. at 932, 117 S.Ct. 1807, *Solomon*, 143 Fed.Appx. at 454 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)). In *Gilbert* the Supreme Court distinguished temporary suspension without pay from termination, noting that lost income alone is "relatively insubstantial" whereas "our opinions have recognized the severity of depriving someone of the means of his livelihood." 520 U.S. at 932, 117 S.Ct. 1807.

While Reilly was not entirely deprived of his livelihood, accepting his punishment would have resulted in more than just a lengthy suspension. Reilly would have been demoted and removed from the promotion list. We do not necessarily equate such action with termination, but we find his punishment is much more like termination than mere suspension. As such, we accord Reilly's interest substantial weight.

The risk of erroneous deprivation was also substantial. While we do not overlook the fact that Reilly was given ample process in his disciplinary hearing before Hearing Officer Flower, Officer Flipping's recommendation (and thereby Solicitor Smoger's and Director Upshaw's decision[24]) heavily relied on Reilly's disciplinary record—evidence that was not part of the record before Hearing Officer Flower. (See Defs. Ex. M; Snellbaker Ex. D at 42-43) While it appears that Reilly would have had access to his own disciplinary history upon request, he had no reason to know that he should review it.

Moreover, the risk of erroneous deprivation could have been easily ameliorated by providing notice to Reilly and some opportunity for him to rebut, correct, modify, or explain the information contained in his disciplinary record.[25] *Cf. Solomon*, 143 Fed.Appx. at 453 ("Pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story.") (citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). It is undisputed that Reilly had

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24. We will separately address below whether any of these people had authority to make the final disciplinary decision.

25. The parties do not dispute that there was in fact a significant error in Reilly's disciplinary history. Additionally, Reilly suggests that he would have referred the decision-makers to his personnel file which contained very positive reviews of his job performance.

little to no notice and no opportunity to be heard before the final determination of his punishment.[26] Yet it would have been relatively easy for the decision-maker or participants in the decision making process to inform Reilly or his counsel that evidence not presented at the hearing—namely Reilly's disciplinary history—was being considered in determining the final disciplinary decision.

The government's interest in implementing Reilly's punishment without notice and opportunity to respond was minimal. As discussed above, affording Reilly an opportunity to respond prior to the punishment decision " 'would impose neither a significant administrative burden nor intolerable delays.' " *Solomon,* 143 Fed.Appx. at 454 (quoting *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 544, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). Additionally, Defendants do not assert, and we find no evidence in the record that circumstances required Defendants to act quickly in making their determination.[27] *See Solomon,* 143

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26. Reilly's attorney, Arthur Murray, who represented him during the sexual harassment hearing, testified that Murray may have received a "courtesy call" from Flipping before Reilly received the formal notice, but we draw the reasonable inference that the courtesy call was just that—a courtesy-and not a meaningful opportunity to dispute the decision. (Snellbaker Ex. D at 41).

27. We note that the New Jersey Administrative Code contains special procedural provisions for immediate (Cont'd)

Fed.Appx. at 453 (citing *Gilbert*); *cf. Gilbert*, 520 U.S. at 932, 117 S.Ct. 1807 ("the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility."). Thus we find that Reilly has put forth sufficient evidence of a procedural due process violation based on the theory that evidence outside the record was considered without appropriate notice or opportunity to be heard.

Moreover, we note the record is not at all clear as to who has authority to make the final disciplinary decision, and who actually made the decision in Reilly's case. Interestingly, Defendants have divergent conclusions on the authority issue. Counsel for Snellbaker apparently ascribes disciplinary authority to Snellbaker, stating unequivocally, "the Chief of Police is required by statute to enforce the rules and regulations of his department." (See Snellbaker Br. at 8) They cite N.J.S.A. 40A:14-118: "the chief of police . . . shall be the head of the police force and [ ] he shall be directly responsible to the appropriate authority for the efficiency and routine day to day operations thereof, and [ ] he shall, pursuant to policies established by the appropriate authority: a. Administer and enforce rules and regulations and special emergency directives for the disposition and

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suspension without notice when an employee is determined to be "unfit for duty or is a hazard to any person if permitted to remain on the job." N.J.A.C. § 4A:2-2.5(a)(1)-(2). Those procedures were not employed here.

discipline of the force and its officers and personnel." *See also* Atlantic City Code § 52-4 (same).

On the other hand, Atlantic City contends that the "appropriate authority"—in this case the Mayor of Atlantic City or his designee[28]—has the final decision making authority after a disciplinary hearing has been held. They rely on N.J. Admin. Code § 4A:2-2.6(d), which states that "[w]ithin 20 days of the hearing, or such additional time as agreed to by the parties, the appointing authority shall make a decision on the charges and furnish the employee either by personal service or certified mail with a Final Notice of Disciplinary Action." The Mayor or his designee is the "appointing authority." *See* N.J. Admin. Code § 4A:1-1.3 (" 'Appointing authority' means a person or group of persons having power of appointment or removal."); Atlantic City Code § 52-1 (granting the "appropriate authority" the power to appoint police officers).

Thus, questions of fact exist as to whether the person with legal authority to make the final discipline decision was actually the person to make the decision in Reilly's case. If Reilly is able to prove at trial that someone other than the person vested with authority to make final discipline decisions made the decision as

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28. "The Mayor or his/her designee shall be designated as the appropriate authority. The appropriate authority shall be responsible for the overall performance of the Division. The appropriate authority shall adopt and promulgate Rules and Regulations for the government of the Division and for the discipline of its members." Atlantic City Code § 52-5.

to his discipline, he will have proven a procedural due process violation. *See Sarteschi v. Burlein,* 508 F.2d 110, 115 n. 7 (3d Cir.1975) ("the plaintiff in the case before us claims that the state failed to follow the proper procedure for dismissal. Once a state creates the expectation of such procedures before discharge, a procedural due process right arises to protect that expectation.") (citing *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)); *cf. Drayton v. Robinson,* 719 F.2d 1214, 1219 (3d Cir.1983) (holding that failure to strictly adhere to procedural requirements for inmate discipline was not a due process violation; explaining that so long as an inmate has some notice and opportunity to be heard "and *the decision maker* reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.") (emphasis added). Thus summary judgment on the issue of procedural due process is inappropriate on this theory as well.

However, we must still address whether Snellbaker and Flipping are entitled to qualified immunity. As stated above, Flipping and Snellbaker are entitled to qualified immunity if the constitutional right which was violated was a clearly established right that a reasonable officer would know of. *Solomon,* 143 Fed.Appx. at 457.

We hold that Snellbaker and Flipping are entitled to qualified immunity on the first theory of liability. *Solomon,* the most applicable case dealing with pre-deprivation notice and opportunity to be heard, was only decided in 2005. Indeed, the Third Circuit noted in

that opinion that the law on presuspension due process rights was not well-settled in 2001, and we have found no factually similar case that would have been available to Flipping or Snellbaker in 2003. Thus, we conclude that a reasonable official making a disciplinary determination would not have known that Reilly was entitled to notice and an opportunity to respond before considering departmenta records outside the disciplinary hearing record.

We come to the opposite conclusion on the second theory of liability. Flipping and Snellbaker are not entitled to qualified immunity because a reasonable official in their positions would have known that they must follow the process established by New Jersey law in making disciplinary decisions. *See Sarteschi*, 508 F.2d at 115 n. 7. Ensuring that the decision maker vested with authority to impose discipline actually makes the disciplinary decision is an integral part of the process established by New Jersey law.

B.

We next examine Atlantic City's liability for the alleged constitutional violations. The issue is whether the alleged constitutional violations resulted from an official government policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A municipality may be liable for the torts of its employees in one of three ways: First, the municipality will be liable if its employee acted pursuant to a formal government policy or a standard operating procedure

long accepted within the government entity; second liability will attach when the individual has policy making authority rendering his or her behavior an act of official government policy; third, the municipality will be liable if an official with authority has ratified the unconstitutional actions of a subordinate, rendering such behavior official for liability purposes. *McGreevy*, 413 F.3d at 367 (internal citations omitted).

Deciding municipal liability requires us to determine whether, under New Jersey law, Flipping or Snellbaker were "final policymakers" with respect to the discipline of police officers. *McGreevy*, 413 F.3d at 368. However, as explained above, we cannot determine on this record who was the final policymaker. If either Snellbaker or Flipping were indeed final policymakers or if they were acting pursuant to a standard operating procedure, Atlantic City could be liable. It is also possible that Atlantic City effectively ratified the actions of either Snellbaker or Flipping. Accordingly we will deny summary judgment with respect to Atlantic City's § 1983 liability.

C.

Reilly also asserts that Defendants conspired to deprive him of his constitutional rights in violation of 42 U.S.C. § 1985(3).[29] We will grant Defendants' motions for summary judgment on this claim.

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29. Section 1985(3) provides for civil liability for conspiracies to interfere with civil rights, stating "[i]f two or more persons in any State or Territory conspire . . . for the (Cont'd)

Appendix B

Reilly must put forth evidence that Defendants were "motivated by a class-based invidiously discriminatory animus," and that they "conspired to deprive plaintiff of the equal protection rights of the laws or of equal privileges and immunities under the laws." *Bougher v. Univ. of Pitt.*, 882 F.2d 74, 79 (3d Cir.1989).

Reilly asserts that the Defendants "conspired to deprive him of career opportunities all based on their political animus toward Reilly." (Pls. Br. at 16) However, Reilly fails to allege or put forth any evidence that Reilly was a member of a larger group or class. Indeed, Reilly's entire complaint is premised on the allegation that Flipping and Snellbaker disliked Reilly personally for actions that he himself took, not for his membership or participation in any larger group. The Third Circuit has recently made clear, "a § 1985(3) claimant must allege some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action in order to state a § 1985(3) claim. Regardless of the alleged basis for discrimination,

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purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

however, and whether that basis is 'invidious' or not, *the allegation of a 'class-based animus' naturally presumes that there is a specific, identifiable class against whom the defendants can have discriminated.*" *Farber v. City of Paterson,* 440 F.3d 131, 135 (3d Cir.2006) (internal citations omitted; emphasis added). Because we find no evidence in the record to support a conclusion that Reilly was a member of any protected class, we will grant summary judgment to Defendants on this claim.

D.

We turn next to Reilly's common law civil conspiracy claim. Under New Jersey law Reilly must prove: (1) a combination of two or more persons; (2) a real agreement or confederation with a common design; (3) an unlawful purpose or a lawful purpose achieved by unlawful means; and (4) special damages. *Morganroth & Morganroth v. Norris, McLaughlin & Marcus,* 331 F.3d 406, 414 (3d Cir.2003); *Perry v. Hon. Daniel Bernardin,* No. 04-6102, 2005 WL 2001919 at *7, 2005 U.S. Dist. LEXIS 18115 at *19-20 (D.N.J. Aug. 18, 2005). The "principal element" of a civil conspiracy claim is " 'an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damage.' " *Perry,* 2005 WL 2001919 at *7, 2005 U.S. Dist. LEXIS 18115 at *19.

Reilly asserts that Flipping and Snellbaker conspired with each other to effectively force Reilly's retirement. Reilly has put forth sufficient evidence that Flipping and Snellbaker discussed Hearing Officer

Flower's disciplinary recommendation and their concerns about the recommendation. Flipping's disciplinary recommendation encompassed Snellbaker's recommendation and both recommendations greatly exceeded Hearing Officer Flower's recommendation. From these facts we may infer, for summary judgment purposes, an agreement to injure Reilly in retaliation for his participation in the Munoz case.

Atlantic City further asserts that it may not be held liable for civil conspiracy because Flipping and Snellbaker are employees of the City and therefore cannot be held to conspire with the City.[30] It is true that under New Jersey law, officers of governmental entities generally cannot conspire with the entity. *Sunkett v. Misci*, 183 F.Supp.2d 691, 722 (D.N.J.2002) (citing *Farris v. County of Camden*, 61 F.Supp.2d 307, 329-30 (D.N.J.1999)); *cf. Gregory v. Chehi*, 843 F.2d 111, 118 n. 4 (3d Cir.1988) (expressing doubts whether town officers can conspire with town). The court in *Sunkett* explained, "the rationale is simple: An abstract entity can only act through its officers, so that a conspiracy between the officers and the entity is like a dance with one's own shadow." *Sunkett*, 183 F.Supp.2d at 722. However the court continued,

> [t]he exception is if the officers are acting 'outside the course and scope of their

30. In briefing this issue both sides rely upon federal authority addressing federal causes of action. We note that New Jersey law, not federal common law, controls with respect to Reilly's civil conspiracy claims.

> employment,' in which case they are no longer representing the employer entity. *Heffernan v. Hunter*, 189 F.3d 405, 412 (3d Cir.1999). The same principles suggest that officers acting within the scope of their employment cannot conspire together. If Agent A and Agent B both act together to employ power that they wield only as a result of their service to Principal A, there is, in truth, only one actor, Principal A. Thus . . . officers cannot conspire together unless they have the power to carry out the purposes of the conspiracy when acting outside the scope of their employment.

Id.

For the reasons explained above, the record is unclear about what authority Flipping and Snellbaker did or did not have when engaging in the challenged activities. Because we cannot determine whether or not the individual defendants were acting within the scope of their employment, summary judgment on the civil conspiracy claim will be denied.

E.

We will also deny summary judgment on Reilly's CEPA claim. A CEPA claim requires: (1) reasonable belief that the employer's conduct violated either a law, rule, or regulation; (2) whistleblowing activity; (3) adverse employment action; and (4) a causal connection between the whistle-blowing and adverse

employment action. *Dzwonar v. McDevitt*, 177 N.J. 451, 828 A.2d 893 (2003); *Caver v. City of Trenton*, 420 F.3d 243, 254 (3d Cir.2005) (quoting *Dzwonar*). Defendants assert that no adverse employment action was taken against Reilly, and alternatively, if there was adverse action, there is no causal connection between his participation in the Munoz case and the adverse action.[31]

Defendants reason that Reilly voluntarily retired, therefore he suffered no adverse employment action. "Retaliatory action" under CEPA is defined as "discharge, suspension, or demotion of an employee or other adverse employment action taken against an employee, in the terms and conditions of employment." N.J.S.A. § 34:19-2. Reilly's punishment included both suspension and demotion. The fact that he later chose retirement to avoid this punishment does not defeat his CEPA claim.

With respect to causation, Defendants contend that the passage of approximately ten years between Reilly's participation in the Munoz case and the alleged retaliatory conduct precludes a finding of causation. While temporal proximity "may permit an inference of causation," *see Schlichtig v. Inacom Corp.*, 271 F.Supp.2d 597, 612 (D.N.J.2003), absence of temporal proximity will not necessarily give rise to a conclusion that no causal connection exists because, "[t]iming [is not] . . . the only method[ ] by which a plaintiff can make

31. Defendants do not dispute the first two elements of Reilly's CEPA claim.

out a prima facie showing of causation. . . . After all, 'it is causation, not temporal proximity . . . that is an element of the plaintiff's prima facie case.' " *Id.* at 612-13 (quoting *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir.2000)); *see also McCullough, Flipping and Snellbaker*, 137 F.Supp.2d at 573 ("the absence of temporal proximity would not necessarily disprove the causal connection.").

"A CEPA plaintiff can prove causation by presenting either direct evidence of retaliation or circumstantial evidence that justifies an inference of retaliation." *Zaffuto v. Wal-Mart Stores, Inc.*, 130 Fed.Appx. 566, 569 (3d Cir.2005). "A plaintiff's circumstantial evidence of retaliation may include evidence that 'demonstrates such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-retaliatory reasons.' " *Id.* (quoting *Kolb v. Burns*, 320 N.J.Super. 467, 478, 727 A.2d 525 (App.Div.1999)).[32]

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32. The Third Circuit noted in *Zaffuto*, "[a]s recognized by the New Jersey courts, the prima facie element of causation and the element of causation in the subsequent ultimate proof stage of the case are often factually inseparable and therefore a court may rely on evidence provided in the earlier phase in resolving the latter." 130 Fed.Appx. at 569 (citing *Donofry v. Autotote Sys., Inc.*, 350 N.J.Super. 276, 795 A.2d 260 (App.Div.2001)).

Appendix B

We hold that Reilly has sustained his summary judgment burden by presenting evidence that Flipping and Snellbaker's proffered reasons for their disciplinary recommendations—namely the "egregiousness" of Reilly's conduct and his prior disciplinary history-are unworthy of credence. A reasonable fact finder could find Snellbaker's conclusion that Reilly's conduct was "egregious and reprehensible" (Defs.Ex.J) merely pretextual given Hearing Officer Flower's determination that Reilly had not directed his activity at the complainant and did not intend to intimidate her. (Defs.Ex.I) Likewise, a reasonable fact finder could conclude that Flipping's proffered reason for recommending such a severe punishment, namely that "Reilly has exhibited behavior throughout his career that indicates racism, bigotry, sexism, lack of impartiality toward the public, irresponsibility, bringing the department into disrepute, failures to perform lawful duties from competent authority as directed and failures to treat others with respect," (Defs.Ex.L) was pretext given the disparity between Flipping's description of Reilly's disciplinary history and Reilly's actual disciplinary record (Pls.Ex.I).

Reilly has also come forth with a plausible explanation for the passage of time between the adverse employment action and the Munoz investigation. Friel testified that the sexual harassment incident was Flipping's first opportunity to "get even" with Reilly. (Pls. Ex. B at 26-27) Thus, for the same reasons we denied summary judgment on the First Amendment claim above, we also deny summary judgment on the

CEPA claim. *See Schlichtig v. Inacom Corp.*, 271 F.Supp.2d 597, 609 (D.N.J.2003) (A prima facie showing of causation under CEPA is established where the plaintiff produces evidence that "it is more likely than not that his statutorily protected conduct . . . was a determinative or substantial motivating factor in [the defendant's] decision to terminate his employment.") *compare with Baldassare*, 250 F.3d at 195; *McGreevy*, 413 F.3d at 365-66 (First Amendment retaliation requires a showing that alleged retaliatory motive was a substantial motivating factor for the adverse employment action); *see also McCullough, Flipping and Snellbaker*, 137 F.Supp.2d at 574 (denying defendants' motion for summary judgment on CEPA claim for same reasons summary judgment was denied on First Amendment retaliation claim).

We further note that unlike Reilly's § 1983 claims, Atlantic City is subject to respondeat superior liability on Reilly's CEPA claim. *See Sunkett*, 183 F.Supp.2d at 716 ("the standard for employer liability under CEPA is lower than under § 1983, as New Jersey imposes respondeat superior liability upon employers.") (citing *Abbamont v. Piscataway Twp. Bd. of Ed.*, 138 N.J. 405, 420-21, 650 A.2d 958 (1994)).

Accordingly, we will deny Defendants' Motions for summary judgment on the CEPA claim.

F.

Finally, Defendants assert that Reilly is not entitled to punitive damages for either his § 1983 claims against Flipping and Snellbaker individually or his CEPA claim.

To obtain punitive damages against a public official in their individual capacity, a § 1983 plaintiff need only prove "conduct [by defendants] that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Smith v. Wade,* 461 U.S. 30, 46-47, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). "This standard is disjunctive: 'The defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard.' " *Springer v. Henry,* 435 F.3d 268, 281 (3d Cir.2006)(quoting *Savarese v. Agriss,* 883 F.2d 1194, 1204 (3d Cir.1989)). A reasonable fact finder could conclude that Flipping and Snellbaker acted with at least recklessness as to Reilly's First Amendment and procedural due process rights. Therefore summary judgment will be denied on the punitive damages claims against Flipping and Snellbaker individually.

We will also deny summary judgment as to punitive damages for the alleged CEPA violation. The New Jersey Supreme Court has held, " 'punitive damages may be awarded [against a public entity] only if the conduct of managerial or supervisory government officials is particularly egregious and involves willful

indifference or actual participation. Based on that kind of misuse of governmental authority, punitive damages serve to effectuate the goals of a statute that is specifically designed to discourage and eradicate vindictive action by employers and to further important interests of both employees and the public.' " *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 444, 828 A.2d 883 (2003) (quoting *Abbamont v. Piscataway Township Bd. of Educ.*, 138 N.J. 405, 650 A.2d 958 (1994)). If Reilly successfully proves his case at trial, a reasonable fact finder could find that Flipping and Snellbaker actually participated in the alleged retaliatory conduct for vindictive reasons. Accordingly, summary judgment on punitive damages will be denied.

IV.

For the foregoing reasons, we will grant Defendants' Motions for Summary Judgment on the (a) § 1985(3) claim and (b) procedural due process claim against Flipping and Snellbaker in their official capacities on the ground that they are entitled to qualified immunity to the extent the claim is based on the theory that the disciplinary decision was based upon evidence not considered by Hearing Officer Flower. To the extent Reilly's procedural due process claim is based upon the theory that someone other than the authorized decision maker made the final determination of discipline in Reilly's case, qualified immunity for either Flipping or Snellbaker will be denied and summary judgment will be denied. Defendants' Motions for Summary Judgment will be denied in all other respects. The Court will issue an appropriate order.

Appendix B

Date: April 5th, 2006

s/ Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

APPENDIX C — ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 5, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HONORABLE JOSEPH E. IRENAS
CIVIL ACTION NO. 03-5975 (JEI)

ROBERT REILLY,

Plaintiff,

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING; JOSEPH MCCULLOUGH; and ARTHUR SNELLBAKER,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
(Docket Nos. 30, 31, 33)

IRENAS, Senior District Judge:

This matter having appeared before the Court on the Motions for Summary Judgment of Defendants McCullough and Flipping (Docket No. 30); Defendant

Snellbaker (Docket No. 33); and Defendant The City of Atlantic City (Docket No. 31) (Defendants McCoullough, Flipping, Snellbaker and Atlantic City collectively "Defendants"), the Court having considered the submissions of the parties, and for the reasons set forth in an Opinion issued by this Court on even date herewith, and for good cause appearing;

IT IS on this 5th day of April, 2006,

ORDERED THAT:

(1) Defendants' Motions for Summary Judgment on the § 1985(3) claim (Count II of the Complaint) are hereby **GRANTED**.

(2) Defendants' Motions for Summary Judgment on the procedural due process claim against Flipping and Snellbaker in their official capacities, are hereby **GRANTED** on the ground that Flipping and Snellbaker are entitled to qualified immunity, to the extent the claim is based on the theory that the disciplinary decision was based upon evidence not considered by Hearing Officer Flower.

(3) Defendants' Motions for Summary Judgment on the procedural due process claim against Flipping and Snellbaker in their official capacities are hereby

DENIED to the extent the claim is based upon the theory that someone other than the authorized decision maker made the final determination of discipline in Plaintiff's case.

(4) Defendants' Motions for Summary Judgment are hereby **DENIED** in all other respects.

s/ Joseph E. Irenas
JOSEPH E. IRENAS, S.U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING (FILED BY APPELLANT, ROBERT FLIPPING) DATED AUGUST 6, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2591

ROBERT REILLY

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING;
JOSEPH B. McCULLOUGH;
ARTHUR SNELLBAKER

Robert Flipping,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN and ALARCÓN*, *Circuit Judges*

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* The Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

Appendix D

The petition for rehearing filed by Appellant, Robert Flipping, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: August 6, 2008

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING (FILED BY APPELLANT, ARTHUR SNELLBAKER) DATED AUGUST 6, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-2734

ROBERT REILLY

v.

CITY OF ATLANTIC CITY; ROBERT FLIPPING;
JOSEPH B. McCULLOUGH;
ARTHUR SNELLBAKER

Arthur Snellbaker,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN and ALARCÓN*, *Circuit Judges*

---

* The Hon. Arthur L. Alarcón, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

Appendix E

The petition for rehearing filed by Appellant, Arthur Snellbaker, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

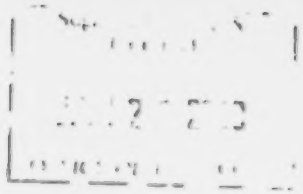
By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: August 6, 2008

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(3)



No. 08-608

IN THE

Supreme Court of the United States

ROBERT FLIPPING and ARTHUR SNELLBAKER,

Petitioners,

v.

ROBERT REILLY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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January 2009

QUESTIONS PRESENTED

1. Whether a public employee's truthful trial testimony is citizen speech protected by the First Amendment.

2. Whether the Third Circuit erred in denying qualified immunity on the ground that it is clearly established that retaliation for truthful trial testimony violates the First Amendment.

3. Whether the Third Circuit erred by declining to resolve a fact dispute as to whether petitioners would have treated respondent the same way absent his protected conduct.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek this Court's review of three questions arising from a Third Circuit decision affirming a district court's denial of summary judgment based on qualified immunity. Petitioners have failed to show any compelling reason to grant the writ.

First, petitioners claim that the Third Circuit's conclusion that truthful trial testimony is citizen speech protected by the First Amendment is contrary to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and conflicts with the decisions of other courts. Petitioners' premise is flawed because *Garcetti* did not reach the question, and the court below applied the principles of *Garcetti* and numerous other decisions of this Court in finding that, because it is a duty of all citizens, courtroom testimony is protected by the First Amendment even when the speaker is a public employee. Further, the only decision cited by petitioners that even arguably conflicts with the decision below is an unpublished and cursory decision from the Eleventh Circuit that did not consider this Court's precedents holding that the duty to testify truthfully in court is shared by all citizens. Because the only decision that arguably conflicts with the decision below is not binding on any court, it does not establish a circuit split warranting this Court's review.

Petitioners also seek review to correct an alleged error in the Third Circuit's determination that it is clearly established that retaliation for truthful trial testimony violates the First Amendment. This claim does not provide a basis for granting the writ because, as discussed below, numerous cases from well before the event in question had demonstrated that the conduct at issue is unlawful.

Finally, petitioners suggest that the Court grant certiorari to correct the Third Circuit's supposed error in declining to determine whether respondent would have been treated the same way even absent the protected conduct. Because this issue is one of fact that the district court found to be in dispute, it was not subject to resolution on summary judgment or interlocutory appellate review, and thus provides no basis for granting a writ of certiorari.

STATEMENT

Respondent Robert Reilly was an Atlantic City police officer from 1978 until June 1, 2003. Pet. App. 4a. Reilly faced disciplinary charges for conduct alleged to have created a hostile work environment. An independent hearing officer heard testimony from a dozen witnesses and issued a lengthy opinion finding that Reilly had violated departmental rules and regulations but that, due to mitigating circumstances, a reduction in rank or lengthy suspension was inappropriate. The hearing officer

recommended that Reilly be suspended without pay for four days. *Id.* at 6a.

Petitioners Robert Flipping and Arthur Snellbaker were Atlantic City's Public Safety Director and Police Chief, respectively. *Id.* at 4a. Flipping and Snellbaker rejected the hearing officer's recommendation and instead proposed that Reilly be removed from the promotions list and suffer a demotion from sergeant to patrolman and a suspension of ninety days without pay. *Id.* at 7a. Reilly retired by agreement to avoid such punishment and then sued petitioners under 42 U.S.C. § 1983 alleging, in relevant part, that Flipping and Snellbaker violated his First Amendment rights by seeking to impose excessive discipline on him in retaliation for his trial testimony in a police corruption prosecution of Flipping's friend and colleague, Dennis Munoz. *Id.* at 9a.

Petitioners moved for summary judgment on Reilly's First Amendment retaliation claim. The district court, in a decision issued two months before this Court decided *Garcetti*, applied the *Pickering* test and held that Reilly's First Amendment claim could proceed. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). First, the district court held "[t]hat testifying at a criminal trial is clearly protected speech." Pet. App. 59a (citing *Pro v. Donatucci*, 81 F.3d 1283, 1291 n.4 (3d Cir. 1996)). Second, it found that "the balance of interests favors Reilly" because "'the public's interest in exposing

potential wrongdoing by public employees is especially powerful,'" *id.* (quoting *Baldassare v. New Jersey*, 250 F.3d 188, 198 (3d Cir. 2001)), and easily outweighs the police department's interest in avoiding any workplace disruption that might result from the revelation of criminal wrongdoing within the department. *Id.* at 60a.

Third, the trial court recognized that "it is for the fact-finder to decide: (a) whether Reilly's increased punishment was substantially motivated by his participation in the Munoz case and (b) whether his increased punishment would have occurred in the absence of his participation," and concluded that Reilly had "met his burden of establishing a *prima facie* case." *Id.* Specifically, the district court found that Reilly had put forth sufficient evidence to create a triable issue of fact with regard to whether Flipping and Snellbaker had retaliated against him on account of his testimony in the Munoz case, citing Reilly's own testimony, the corroborating testimony of another police officer, and the severity of the discipline petitioners sought to impose in contrast to the recommendation of the hearing officer. *Id.* at 60a–61a.

Finally, the district court held that petitioners were not entitled to qualified immunity on Reilly's First Amendment claim because the *Baldassare* decision was "factually similar to Reilly's case" such that "a reasonable official in Flipping's or Snellbaker's position in 2003 would have understood

that increasing Reilly's punishment in retaliation for his participation in the Munoz investigation and trial violated Reilly's First Amendment rights." *Id.* at 62a.

Petitioners appealed from the denial of qualified immunity, arguing that the district court erred by holding that Reilly's trial testimony was protected by the First Amendment. Petitioners argued that under *Garcetti*, 547 U.S. at 421 (holding that the First Amendment does not protect employee expression made pursuant to official responsibilities), Reilly's trial testimony was not protected speech because testifying at trial was part of Reilly's duties as a police officer. Pet. App. 19a. Noting that "there was no argument, let alone fact finding, by the District Court as to whether Reilly's speech was made pursuant to his official duties," *id.* at 20a–21a, the Third Circuit concluded that it could resolve the issue as a matter of law based solely on "the fact of Reilly's sworn testimony at the Munoz trial." *Id.* at 28a. The court held that Reilly testified pursuant to his duties as a citizen, and affirmed the district court's denial of petitioners' motion for summary judgment based on qualified immunity. *Id.* at 31a, 35a.

In explaining its decision, the Third Circuit noted that *Garcetti* focused on speech in an internal memorandum and did not reach the question whether an employee's truthful testimony in court is protected by the First Amendment, and that no precedential appellate decision after *Garcetti* had

addressed the question. *Id.* at 28a. The court found, however, that because of the well-established principle that every citizen has a duty to offer truthful testimony in court, and because trial testimony is inherently a matter of public concern and necessary to the integrity of the judicial process, trial testimony is citizen speech, even if it stems from a public employee's job duties. Thus, the court below held that First Amendment retaliation claims based on courtroom testimony are "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." *Id.* at 31a.

The court of appeals denied Flipping's petition for rehearing or rehearing en banc, and Justice Souter denied petitioners' application for a stay of the judgment pending disposition of the petition.

REASONS FOR DENYING THE WRIT

I. There Is No Compelling Reason to Review the Lower Court's Determination That Truthful Trial Testimony Is Citizen Speech.

Petitioners seek certiorari on the first question presented based on their assertion that the decision below is contrary to *Garcetti* and conflicts with the decisions of other courts. As explained below, petitioners' arguments are misplaced because *Garcetti* did not reach the first question presented and there is no meaningful circuit split on the issue.

A. The Decision Below Does Not Conflict with *Garcetti*.

Petitioners' claim that the decision below contradicts *Garcetti* is based on their misapprehension of both decisions. First, *Garcetti* never reached the question whether truthful trial testimony is citizen speech protected by the First Amendment even where it may also be a part of the speaker's job. The plaintiff in *Garcetti* claimed that his employer retaliated against him for submitting a disposition memorandum, discussing the matter with two supervisors, testifying truthfully at a hearing, and speaking at a bar association meeting, but the Court's decision addressed only the disposition memorandum. Resolution of the claims involving the other activities, including the plaintiff's testimony in court, was left to be decided on remand. *See* 547 U.S. at 443–44 (Souter, J., dissenting) (noting that "the claim relating to truthful testimony in court must surely be analyzed independently to protect the integrity of the judicial process"). Moreover, the Court in *Garcetti* noted that its decision did not "articulate a comprehensive framework" and that certain types of expression not addressed in *Garcetti* might "implicate[] additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." 547 U.S. at 424–25.

Second, petitioners misinterpret *Garcetti* as holding that speech arising from the speaker's

official duties can never be citizen speech for First Amendment purposes. In fact, the Court distinguished between expressive activities that are conducted solely because of the speaker's job duties (such as drafting the disposition memo at issue in *Garcetti*), and those that may be conducted in the speaker's capacity as a private citizen (such as drafting a letter to the newspaper). The former lack First Amendment protection because they do not exist outside the employment relationship. Thus, the employer can restrict those activities without infringing "any liberties the employee might have enjoyed as a private citizen." 547 U.S. at 421–22. But the latter are protected because "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419.

The court below considered *Garcetti* and concluded that truthful trial testimony is citizen speech entitled to First Amendment protection. The Third Circuit rested its conclusion on the many decisions of this Court upholding the principle that trial testimony is a duty owed by all citizens. Pet. App. 23a–24a (citing *United States v. Mandujano*, 425 U.S. 564, 576 (1976); *United States v. Calandra*, 414 U.S. 338, 345 (1974); *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961); *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); *Blair v. United States*, 250 U.S. 273, 281

(1919)). Finding that "[t]he notion that all citizens owe an independent duty to society to testify in court proceedings is thus well-grounded in Supreme Court precedent," *id.* at 25a, the court below held: "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.* at 30a. The court further found that trial testimony is a matter of public concern because uninhibited testimony is essential to the integrity of the judicial process.[1] It concluded that "Reilly's truthful testimony in court constituted citizen speech and [] his claim is not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*." *Id.* at 31a. Thus, the decision below faithfully applied the

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[1] Indeed, this Court has observed that "the fundamental demands of due process of law in the fair administration of criminal justice" require the disclosure of all relevant evidence—it rises to the level of a "constitutional need." *United States v. Nixon*, 418 U.S. 683, 713 (1974). In other words, because the withholding of evidence can impair "the basic function of the courts," *id.* at 712, it is in the interest of due process and the judicial system to have witnesses give complete and truthful testimony. If that testimony is not protected speech, there is a risk that the courts will not receive full and accurate information and justice will not be served. This interest has been held to be strong enough to trump the confidentiality of presidential records, *id.* at 713, and it is sufficient to outweigh the interest of a local police department in protecting itself from testimony about police corruption.

principles of *Garcetti* and did not construct a new or conflicting "forum analysis" as petitioners claim.

B. The Decision Below Does Not Conflict with Precedential Decisions of Any Other Appellate Court.

Petitioners claim that there is a circuit split on the first question presented, but they are unable to cite a single precedential decision holding that truthful trial testimony is not citizen speech. Petitioners rely primarily on the Eleventh Circuit's unpublished decision in *Green v. Barrett*, 254 Fed. App'x 883 (11th Cir. 2007), but, under Eleventh Circuit Rule 36-2, an unpublished decision of that court is not binding circuit precedent. Thus, *Green* cannot establish a circuit split because no court is bound to follow the decision. In any event, the Eleventh Circuit's cursory decision in *Green* failed to consider this Court's precedents holding that the duty to testify truthfully in court is imposed on every citizen, not just on government employees. *See, e.g., Calandra*, 414 U.S. at 345. Because any conflict between the decision below and *Green* is explained by *Green*'s superficial treatment of the issue, the disagreement is too shallow and insignificant to warrant this Court's review.

Petitioners also claim that the decision below conflicts with the Seventh Circuit's decision in *Tamayo v. Blagojevich*, 526 F.3d 1074, 1091–92 (7th Cir. 2008), but they concede that *Tamayo* did not

address the issue of testimony in court. Pet. 13–14. Rather, *Tamayo* involved an agency administrator's testimony before a legislative committee charged with oversight of the agency, and her testimony concerned attempts by other public officials to encroach on the agency's independence. Because the administrator was discharging the duties of her office by reporting allegedly improper political influence over the agency to her supervisors, the Seventh Circuit concluded that she was speaking as an employee and not as a citizen. 526 F.3d at 1091–92. The result in *Tamayo* is consistent with this Court's conclusion in *Garcetti* that the First Amendment does not protect "communications between and among government employees and their superiors in the course of official business." 547 U.S. at 423. Because the legislative testimony in *Tamayo* was, like the memorandum at issue in *Garcetti*, a report made by an employee to her superiors in the course of her job duties, *Tamayo* does not conflict with the Third Circuit's conclusion that trial testimony is citizen speech. Even where trial testimony stems from the speaker's job, such testimony is distinct from an employee's report through the chain of command.

Two other Seventh Circuit decisions cited by petitioners, *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), and *Fairly v. Fermaint*, 482 F.3d 897 (7th Cir. 2007), are also consistent with both *Tamayo* and the decision below. In *Morales*, the Seventh Circuit found that a police officer's discussions with an

assistant district attorney about an investigation and arrest were not protected by the First Amendment because such discussions were part of the officer's job duties, but the same speech was protected when the officer testified at a deposition in a civil suit. 494 F.3d at 598. The court in *Morales* explained that under *Garcetti*, the same speech can lack First Amendment protection when it is made as a part of the speaker's job duties, but be entitled to protection when it is made as a result of a duty independent of the employment relationship, such as the duty to testify at a deposition pursuant to subpoena.

Similarly, in *Fairly*, the Seventh Circuit rejected defendants' claim that *Garcetti* precluded all of plaintiffs' First Amendment retaliation claims, noting that plaintiffs had alleged retaliation for "two kinds of speech: not only statements made as part of their duties at work (the kind of speech to which *Garcetti* applies) but also to testimony that plaintiffs gave in inmates' suits." 482 F.3d at 902. The court recognized that *Garcetti* does not preclude a First Amendment retaliation claim premised on testimony in court, because such speech is citizen speech and not a job duty. Because the Seventh Circuit's decisions in *Tamayo*, *Morales*, and *Fairly* are consistent with the decision below, they offer no support for petitioners' claim of conflict.

Petitioners also claim that the decision below "is in tension" with the Third Circuit's decisions in *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006),

and *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007), and that the purported intra-circuit tension is a reason to grant the petition. Pet. 17. To the contrary, an intra-circuit split is not generally a basis for review. *See* Supreme Court Rule 10. Rather, it is the role of the court of appeals to resolve intra-circuit conflicts, but Flipping failed to even raise the issue in his petition for rehearing or rehearing en banc. In any event, the decision below is entirely consistent with *Hill* and *Foraker*.

In *Hill*, the Third Circuit held that the plaintiff Borough Manager's report to his superiors on the Borough Council regarding complaints about the Mayor's treatment of Borough employees was a fulfillment of the Borough Manager's job duties because the Manager was the appointed enforcer of the Borough's personnel policies. Thus, the Manager's report to his superiors on the Council lacked First Amendment protection under *Garcetti*. 455 F.3d at 242. But the Third Circuit further held that the Borough Manager's expression of support for a telecommunications project may have been entitled to protection as citizen speech because, as opposed to the speech regarding employee complaints, there was no indication that the speech was made pursuant to official duties. *Id.*

In *Foraker*, the Third Circuit held that *Garcetti* foreclosed the plaintiffs' First Amendment retaliation claim because the plaintiffs were speaking pursuant to their employment duties when they

reported unsafe workplace conditions through their chain of command. 501 F.3d at 240. Thus, *Hill* and *Foraker* are consistent with the decision below, which turned on the Third Circuit's conclusion that Reilly testified at trial pursuant to a duty owed by all citizens rather than simply in performance of an employment duty.

Finally, petitioners cite numerous cases that have applied *Garcetti* to foreclose First Amendment retaliation claims where the speaker was acting pursuant to official job duties and not pursuant to a duty owed by all citizens. Pet. 18–19. Petitioners concede that none of the cases they cite involve testimony in court, but they claim that the decisions are nevertheless in tension with the decision below because under the Third Circuit's reasoning "each and every one of the cases cited [] would have come out differently if the speech at issue involved courtroom testimony." Pet. 20. Petitioners' observation simply reflects the distinction drawn in *Garcetti* between citizen speech and employee speech; it does not offer any reason for this Court to review the decision below.

II. Petitioners' Assertion That the Third Circuit Erred in Holding That the Protected Status of Reilly's Speech Was Clearly Established at the Time of the Alleged Retaliation Is Unsupported.

Petitioners assert that even if the Third Circuit correctly concluded that *Garcetti* did not foreclose

Reilly's First Amendment claim, certiorari should still be granted because the Third Circuit erred in finding that the protected status of courtroom testimony was clearly established when petitioners allegedly retaliated against Reilly. Pet. 21. Petitioners make two arguments in support of their claim of error. Neither has merit.

First, petitioners claim that the Third Circuit erred in relying on its decision in *Pro* to show that the protected status of courtroom testimony was clearly established because, according to petitioners, *Pro* articulated only a general principle and lacked sufficient specificity to put petitioners on notice that retaliation for truthful trial testimony violates the First Amendment. Pet. 21. But *Pro* held clearly and explicitly that courtroom testimony is protected by the First Amendment; thus, petitioners' conclusory assertion that the decision lacks specificity is without merit. 81 F.3d at 1291–92; *see also* Pet. App. 28a (recognizing "the overwhelming weight of authority concluding that an employee's truthful testimony in court is protected by the First Amendment").

Second, petitioners claim that the holding in *Pro* cannot be considered clearly established because, at the time *Pro* was decided, there was a circuit split on the issue. That argument was rejected when it was raised by the defendant in *Pro*, 81 F.3d at 1292 (holding that a circuit split does not preclude a finding that a right was clearly established), and it has even less merit today, given that the Third

Circuit held that the right to be free from retaliation for courtroom testimony was already clearly established in 1996 when it decided *Pro*. Indeed, the relevant question in this case is whether the right was clearly established when Flipping and Snellbaker acted in 2003.

Petitioners also rest their argument on this Court's conclusion in *Wilson v. Layne*, 526 U.S. 603, 618 (1999), that where judges "disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *See* Pet. at 22. But petitioners have failed to show that judges disagree on the constitutional question presented here. Moreover, *Wilson* involved a situation where there was a lack of case law on the issue at the time of the event, and the disagreement among judges that later developed confirmed that the right had not been clearly established at the earlier time.

In *Wilson*, the Court found that the police violated the Fourth Amendment by bringing members of the media into a home during the execution of a warrant, 526 U.S. at 614, but held that the right had not been clearly established at the time of the search in question. The Court held that a reasonable officer could have believed that the action at issue was lawful because it was not obvious that the conduct violated the Fourth Amendment, the practice was common, there were no cases of controlling authority in the jurisdiction to establish the rule, and

there was no "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* at 617. The Court further found that, given the undeveloped state of the law at the time, it was reasonable for the officers to rely on their formal policies that allowed the practice. In contrast to *Wilson*, this case involves a right established by numerous cases in the Third Circuit well before the event in question. Thus, petitioners' claim that the Third Circuit erred in finding that the protected status of courtroom testimony was clearly established is without merit and provides no basis for this Court to review the decision below.

III. Genuine Issues of Material Fact Are Properly Considered by a Factfinder and Are Not Subject to Resolution on Summary Judgment or Interlocutory Appellate Review.

Petitioners contend that this Court should grant certiorari because the Third Circuit failed to determine whether Reilly would have been subjected to the same discipline absent the protected conduct. Pet. 23–27. Although petitioners are correct that a disciplined employee may not recover when the employee would have received the same penalty even absent the constitutionally protected conduct, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977), nothing in the district court's or Third Circuit's opinions challenges *Mt. Healthy*'s

holding or prevents the petitioners from attempting to make such a showing at trial. Rather, the district court in this case found that there was a fact dispute on the issue, thus precluding its resolution on summary judgment or interlocutory appellate review.

A court ruling on a motion for summary judgment made on the basis of qualified immunity must construe the alleged facts in the light most favorable to the party asserting the injury, *Saucier v. Katz*, 533 U.S. 194, 201 (2001), and motivation is a purely factual issue. *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 529 (1985)). Here, Reilly alleged that the increased discipline was substantially motivated by his protected trial testimony, and, given that his penalty was significantly more severe than that recommended by the neutral hearing officer, Reilly's allegation is more than a bare assertion. *See Larsen v. Senate of the Commonwealth of Penn.*, 154 F.3d 82, 94–95 (3d Cir. 1998) (holding that a court must accept the injured party's allegations that the movant's actions were retaliatory when evaluating a motion for summary judgment unless it can be concluded from the face of the pleadings that the same action would have been taken absent the protected speech). Thus, in evaluating whether petitioners were entitled to summary judgment on the basis of qualified immunity, the courts below properly took as true Reilly's factual allegation that he faced increased discipline in retaliation for his trial

testimony, and that his penalty would not have been the same absent his trial testimony. Pet. App. 60a–61a. Even in the qualified-immunity context, such questions of disputed fact are for the factfinder to decide. *See Johnson v. Jones*, 515 U.S. 304 (1995) (affirming denial of qualified-immunity summary judgment and remanding for factual determinations); *Monteiro*, 436 F.3d at 405.

Not only did the district court properly decline to grant summary judgment when material facts were in dispute, but the Third Circuit lacked appellate jurisdiction to review the district court's determination that there was a fact dispute. *Johnson*, 515 U.S. at 319–20 ("[W]e hold that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."); *Charles v. Grief*, 522 F.3d 508, 512 (5th Cir. 2008) (holding that a district court's determination that there was a genuine issue of material fact as to whether an employee was retaliated against for protected speech, or whether the termination would have occurred absent the protected speech was unreviewable by an appellate court). *Johnson* held that although questions of law related to qualified immunity are immediately appealable, determinations about whether factual disputes are genuine are not final decisions and thus not subject to interlocutory review, even in the qualified-immunity context. 515 U.S. at 317.

Because the Third Circuit did not have appellate jurisdiction over this issue, this Court lacks jurisdiction to review it. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (holding that the Court lacks jurisdiction to decide the merits of a claim if the court of appeals was without jurisdiction).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

ROBERT FLIPPING and ARTHUR SNELLBAKER,

Petitioners,

v.

ROBERT REILLY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

Currently pending before the Court is the joint petition for a writ of certiorari filed on behalf of Arthur Snellbaker and Robert Flipping which, in pertinent part, is based upon Petitioners' belief that the Third Circuit's decision in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), is in conflict with this Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as well as other post-*Garcetti* decisions rendered in other Circuits. Initially, Respondent, Robert Reilly, waived his right to file a response. However, on December 2, 2008, the Court directed Respondent to respond to the petition. In accordance therewith, Respondent submitted a brief in opposition to the pending petition, which was docketed on January 22, 2009. Since that time, additional research has led to the discovery of the Eleventh Circuit's decision in *Kahn v. Fernandez-Rundle*, 287 Fed. Appx. 50 (11th Cir. 2007), wherein it was held that an attorney's in-court statements were not entitled to First Amendment protection in light of *Garcetti*. Because of the significance of the *Kahn* decision and its direct impact on the pending petition, Petitioners hereby submit this supplement brief pursuant to Rule 15.8 for the Court's consideration.[1]

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1. Petitioners acknowledge that *Kahn* was decided prior to the filing of the pending application. Despite extensive research, Petitioners were not aware of this opinion from the Eleventh Circuit until now. Given the importance of the constitutional issue presented by the matter *sub judice*, it is respectfully submitted that this supplemental brief has been filed in good faith and consistent with Rule 10, which sets forth the considerations governing review on certiorari.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Notwithstanding this Court's holding in *Garcetti*, *supra.*, the Third Circuit in *Reilly*, *supra.*, held that a public employee's testimony in court, even when made pursuant to the official's duties, is protected by the First Amendment. *Id.* at 231. In stark contrast, the Eleventh Circuit in *Kahn*, *supra.*, held that statements made by an attorney in court were not protected where those statements were made pursuant to the attorney's official duties. *Id.* at 54. As things stand now, a public employee who walks into court and testifies pursuant to his/her official duties is cloaked with First Amendment protection, while at the same time a government attorney, bound by rules of professional conduct and ethics which demand nothing less than complete candor toward the tribunal, who makes statements in-court pursuant to his/her official duties is not. That such an anomalous situation exists is reason alone to grant the within petition.

As the Eleventh Circuit aptly stated in *Kahn*: "The fact that Kahn's speech occurred in a courtroom (and not in an internal memorandum) does not change the analysis required by *Garcetti*. When a lawyer speaks as an 'officer of the court' he is necessarily speaking as his client's representative. Nothing in the relevant bar rules changes the fact that Kahn's speech 'owes its existence' to his role as the government's lawyer." *Id.* at 53. The Third Circuit, however, does not appear to agree with this line of reasoning. As the Panel in *Reilly* stated: "That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/

her independent obligation as a citizen to testify truthfully." *Id.* at 231. The inconsistency in these two approaches is readily apparent and serves as yet another basis upon which the petition can and should be granted.

Presumably when this Court made the unequivocal statement in *Garcetti* that "the controlling factor" is that the public employee's expressions are made pursuant to his/her official duties, *id.* at 421, it meant what it said. Indeed, it is submitted that this language could not be any more clear and unambiguous, as evidenced by not only the Eleventh Circuit's decision in *Kahn*, *supra.*, but also the numerous other decisions cited in the original petition which have followed the "official duties" test enunciated in *Garcetti*. In *Reilly*, however, the Third Circuit chose not to follow this test, and instead created its own test focusing on the forum through which Respondent's speech was conveyed. That a conflict exists is undeniable. The only way to reconcile the conflict and settle the issue once and for all is to grant the within petition.

CONCLUSION

For the forgoing reasons, as well as those set forth in the original petition, it is respectfully requested that the Supreme Court grant review of this matter.

Respectfully submitted,

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